Gunalan a/l Ramachandran & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–05–26 OF 2002, W–05–27 OF 2002, W–05–28 OF 2002

DENIS ONG, ABDUL HAMID MOHAMAD AND ABDUL AZIZ MOHAMAD JJCA

6 AUGUST 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(d), (da) — Trial judge made finding of possession of drugs by appellants — Trial judge invoked presumption of trafficking under s 37(da)(iiia) — Whether trial judge wrongly relied on presumption in s37(d) to make finding of possession and then relied on presumption under s 37(da) for trafficking

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(j) — Whether ten per centum amount stipulated in s 37(j) referred to number of receptacles only — Whether Dangerous Drugs Act required at least ten per centum of total weight of substance to be analyzed

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Drugs found in room where appellants were in — Whether prosecution to prove exclusive possession of room by appellants

Criminal Procedure — Appeal — Conviction, against — Trafficking in dangerous drugs — Finding of fact by trial judge that accused were sitting in front of drugs when police arrived — Whether inherently incredible — Whether any misdirection on part of trial judge — Whether to interfere with trial judge's findings

Evidence — Exhibit — Break in chain of evidence — Drug trafficking — Proof that recovered substance sent to chemist for analysis — Whether there was break in chain of evidence — Whether break in chain of evidence fatal to prosecution's case

The three appellants were charged that they did on 3 February 1999 at about 10.25pm in a room in an unnumbered house at Kg Sam Yoke, Jalan Sungai Besi, Kuala Lumpur, Wilayah Persekutuan traffic in a dangerous drug, namely, 61.1g of monoacetylmorphines and that by virtue thereof, they had committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act, read with s 34 of the Penal Code. The facts adduced by the prosecution were that on 3 February 1999 at about 10.25pm, a team of police officers led by Chief Inspector Rajendran a/l Kanesan ('PW4') went to an unnumbered squatter house at Kampong Sam Yoke, Sungai Besi, Kuala Lumpur to conduct a raid. On arrival at the house, PW4 and his team rushed inside. In the hall, they found a group of ten Indian males watching television. PW4 introduced himself and directed his men to arrest them. At that point of time PW4 saw a male Indian ('the second appellant') opening the door of a room adjoining the hall. The second appellant closed the door upon seeing PW4 and his team. PW4 kicked the room door and rushed inside, followed by two other police officers. In the room, PW4 saw the first and third appellants sitting cross-legged on the floor in front of some items. At the same time, PW4 saw the first appellant dropped a heat-sealer on the floor. The

items in front of the first and third appellants comprised plastic packets and a bowl, both containing yellow powder and granular substance suspected to be heroin, a weighing machine and a heat-sealer. The chemist confirmed that the yellow powder and granules found in the plastic packets and bowl contained monoacetylmorphines, a type of dangerous drugs under Part III, First Schedule of the Act and the weight was 61.1g. The three appellants were convicted and sentenced to death by the High Court. This was their appeal against the conviction. The essential defence of the appellants related to the circumstances and the events leading to the police officers entering the room.

Held, dismissing the appeal:

(1) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The appellants' counsel had contended that it was inherently incredible that the first and third appellants were sitting down when PW4 entered the room. This was a question of fact and the learned trial judge had found PW4 and the other prosecution witness to be honest witnesses and ruled that there was no reason to reject their testimonies that the first and third appellants were seated on the floor at the time when the police officers entered the room. There was no misdirection on the part of the learned trial judge or failure to consider material evidence in making his finding of facts. The learned trial judge had the advantage of seeing and listening the witnesses and there was no reason to interfere with his findings (see paras 14–16).

(2) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The trial judge had ruled that there was clear proof that the appellants were in possession of the drugs. In respect of the second appellant, the trial judge held that his presence in the room and his participation in furtherance of the common intention rendered him liable under s 39B(1)(a) of the Act read with s 34 of the Penal Code. There was no misdirection on the part of the learned trial judge on the issue of common intention whether in law or on facts (see paras 20–22); *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 distinguished.

(3) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The appellants were found with the drugs and drug-packing paraphernalia in the room where only the three of them were present. Hence, the question of exclusive possession of the room was not material. Rather, the issue was whether the appellants had exclusive possession of the drugs. Therefore, there was no merit in the defence's argument that the prosecution's case must fail because the prosecution did not prove exclusive possession of the room by the appellants (see para 29); *Mohan Singh a/l Lachuman Singh v PP* [2002] 3 MLJ 291 and *Pang Chee Meng v Public Prosecutor* [1992] MLJ 137 distinguished.

(4) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) Even though the packets containing the drugs were sent for finger printing impression, no finger printing impression sufficient for analysis could be lifted. Also, hand swabs and nail clippings were not taken. Such

A evidence, if any, would only add to other available evidence of possession. Without it, it did not necessarily mean that possession was not proved. In view of the proof of possession as found by the learned trial judge, the inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings did not in any way affect that finding of possession by the learned trial judge (see paras 38–39).

(5) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) In a drug trafficking case, it was important to prove that the substance that had been recovered was sent to the chemist for analysis and that the analysis showed that it was heroin or other dangerous drug. Therefore, the chain of evidence was more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then, it did not necessarily mean that if the exhibit was handed from one person to another, every one of them must be called to give evidence regarding the handing over or that if there was a break in the chain of evidence, even for one day, the case would fall. The fact that there was a gap in the chain of evidence did not necessarily mean that that fact was not proved. It depended on the facts and circumstances of each case. The next period to consider was from the time that the substance was received back from the chemist until it was produced in court. The chain of evidence in this second period was less important because there was no law requiring the exhibit recovered to be produced in court or that if the exhibit was not produced in court, the prosecution's case must necessarily fall. The prosecution's case may or may not fall depending on the facts and the circumstances of each case. Here, the learned trial judge had dealt at length on the issue of break of chain of evidence and concluded that there was no merit to the contention that there was a break in the chain of evidence from the day the drugs were seized until the date of trial (see paras 41–45).

(6) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The learned trial judge had made a definite finding of possession of the drugs by the first and third appellants and the presumption of trafficking under s 37(da)(iiia) of the Act was invoked against the first and third appellants. Therefore, it was not correct to say that the learned trial judge had wrongly relied on the presumption in s 37(d) of the Act to make a finding of possession and then relied on presumption under s 37(da) for trafficking (see paras 55, 57).

(7) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The ten per centum amount stipulated in s 37(j) of the Act referred to the number of receptacles and not the total weight of the drugs found or the total weight of the samples taken. There was no provision whatsoever in the Act which required at least ten per centum of the total weight of the substance in question to be taken out for the purpose of analysis. The only time the words 'ten per centum' appeared in the Act was in s 37(j) of the Act and these words referred to 'receptacles' when the drugs

were contained in a number of receptacles and not to the weight (see paras 68, 82–83); *Au Ah Lin v Public Prosecutor* [1963] MLJ 365 and *Public Prosecutor v Lam San* [1991] 3 MLJ 426 followed; *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 and *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 not followed.

(8) (per **Abdul Hamid Mohamad** and **Denis Ong JJCA** concurring) The learned trial judge had not misdirected himself on the law. He had considered the evidence both for the prosecution and for the defence very carefully and had given his reasons as to why he accepted or did not accept certain evidence and correctly came to the conclusions that he did. He had the advantage of seeing and hearing the witnesses. There was no reason to interfere with his findings of facts or his final decision (see para 97).

(9) (per **Abdul Aziz Mohamad JCA** dissenting) The trial judge had found that the defence had failed to raise a reasonable doubt on the case for the prosecution because the defence was a mere denial. If what the trial judge meant by 'mere denial' was that the defence was not supported by some independent or concrete evidence, then he was wrong to have dismissed the defence for that reason. This was because if the events had truly occurred as claimed by the three appellants, those events were of such a nature that no independent or concrete supporting evidence could have been made available to the appellants anyway. It would be a case of one man's word against another's. On the other hand, if what the learned trial judge meant by 'mere denial' was that he had found the story of the defence to be improbable, then he should have given his reasons for so finding, which he failed to do (see para 105); *Mohamad Radhi bin Yaakub v Public Prosecutor* [1991] 3 MLJ 169 followed.

(10) (per **Abdul Aziz Mohamad JCA** dissenting) The appellants had claimed that a black pouch-bag and the paper package containing drugs were found by the police in the sitting room. The trial judge made a finding that the black pouch-bag and the paper package containing drugs did not exist. However, he did not say whether he found the appellants' claim not only untrue but also not probable. The trial judge's rejection of the appellants' claim concerning the pouch-bag and the paper package might be seen as the only reason that he had to offer for finding that the defence was not probable. No reasons were given that were directed to the circumstances themselves, namely, the circumstances when the police entered the room. The trial judge had failed to give sufficient reasons for finding that the defence story failed to cast a reasonable doubt on the prosecution case (see paras 108, 111).

(11) (per **Abdul Aziz Mohamad JCA** dissenting) There were two remarkable circumstances in the evidence for the prosecution that were fit to be considered in determining whether the defence story was probable. First, there certainly would have been a lot of noise before the nine police officers entered the living room. Further, one of them had been bitten by a dog outside the house. When the police officers entered the

hall, there were ten male Indians in the room and PW4 had declared 'police' in a loud voice. In those circumstances, the first and third appellants would have been aware of the presence of the police and it was incredible that if they had been sitting cross-legged facing the drugs in the room before the police arrived, they would have continued to remain in that position when the police barged in. It was a point that merited serious consideration because even though the first and third appellants would have had only four or five seconds within which to react to the knowledge of the presence of the police, the normal reaction one would expect of a person in that situation would be instinctively instantaneous. He would have instantly jumped up away from the incriminating drugs. Yet the trial judge disposed of the point on the basis that PW4 and the other prosecution witness appeared to be truthful witnesses. To accept it as true beyond reasonable doubt, to be able to entertain no doubt as to its truth, one had to have a reason for accepting it as credible in the circumstances (see paras 112–113).

(12) (per **Abdul Aziz Mohamad JCA** dissenting) Secondly, there was the conflicting evidence as to what the first appellant was actually doing when the police officers entered the room. The evidence was that PW4 was the first to enter, followed by another police officer, Duraiyappa. PW4 said that he saw the first appellant dropped a heat-sealer on to the floor. Duraiyappa, on the other hand said that he saw the first appellant putting powder in a small plastic packet. The trial judge had stated that this conflict of evidence did not prejudice the prosecution's case and that what was important was whether the items containing the drugs were present in front of the first appellant. The trial judge then went on to say that the fact that there was a difference in what the two witnesses said they saw showed that their evidence was not a fabrication. Whilst it was true that minor discrepancies were to be expected in the evidence of different witnesses about the same thing and that when evidence was fabricated the witnesses were likely to give evidence that was identical to the last detail, the conflict of evidence in this case was not over an insignificant matter. Rather, it was about an activity that the prosecution relied on, besides other factors, to prove knowledge in order to establish possession of the drug. Finally, the trial judge said that he preferred the evidence of PW4 because he was the first to enter the room. The reason for accepting PW4's testimony as the account of what had actually happened surely cannot be sound. Although PW4 had entered the room first, it was only in the sense that he was in front of Duraiyappa. Both of them had entered the room at the same instant and it was then that they saw what was going on. When two persons who directed their attention to the same spot at the same instant gave entirely different accounts of what they saw, there was no reason in logic or nature to credit the one who was in front of the other with the correct vision (see paras 114–116).

(13) (per Abdul Aziz Mohamad JCA dissenting) Although at the close of the case for the prosecution the trial judge had found that those two

circumstances did not impair the case for the prosecution, after hearing the evidence for the defence, he should have tested it against the prosecution evidence in order to determine whether the defence story was probable, and in doing so he should have recalled those two circumstances that had emerged even in the evidence of the prosecution and taken them into consideration. But the trial judge had offered no reason or no sufficient reason, and therefore may have had no reason or sufficient reason for finding that the defence was not probable and had failed to cast a reasonable doubt on the case for the prosecution. Therefore, according to *Mohamad Radhi bin Yaakob v Public Prosecutor*, the three appellants should not have been convicted (see para 117).

(14) (per **Abdul Aziz bin Mohamad JCA** dissenting) The presumption in s 37(j) of the Act may only be resorted to where the substance 'is contained in a number of receptacles'. Further, if s 37(j) of the Act was to be resorted to in such a situation so as to have the benefit of the presumption, the chemist had to analyse 'samples of the contents of a number not less than ten per centum of such receptacles'. The samples to be analysed were samples of the contents of a number of the receptacles. The number of receptacles must be not less than ten per centum of the total amount of receptacles. The ten per centum therefore referred to the number of receptacles. The chemist had to take samples from that number of receptacles. Section 37(j) of the Act did not specify the amount of sample that had to be taken from each receptacle and analysed. The ten per centum did not quantify the sample (see para 121); *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 and *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 not followed.

[Bahasa Malaysia summary

Ketiga-tiga perayu telah dituduh bahawa mereka telah pada 3 Februari 1999 lebih kurang 10.25pm dalam sebuah rumah tidak bernombor di Kg Sam Yoke, Jalan Sungai Besi, Kuala Lumpur, Wilayah Persekutuan mengedar dadah berbahaya, iaitu, 61.1g monoacetylmorphines dan berdasarkan itu, mereka telah dilakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum di bawah s 39B(2) Akta tersebut, dibaca bersama s 34 Kanun Keseksaan. Fakta yang dikemukakan oleh pihak pendakwaan adalah bahawa pada 3 Februari 1999 lebih kurang 10.25pm, sepasukan polis diketuai oleh Ketua Inspektor Rajendran a/l Kanesan ('PW4') telah ke sebuah rumah setinggan tidak bernombor di Kampong Sam Yoke, Sungai Besi, Kuala Lumpur untuk melakukan satu serbuan. Setiba di rumah itu, PW4 dan pasukannya menyerbu masuk. Di ruang tamu, mereka menemui sekumpulan sepuluh lelaki India menonton televisyen. PW4 memperkenalkan dirinya dan mengarahkan orangnya menangkap mereka. Ketika itu PW4 melihat seorang lelaki India ('perayu kedua') sedang membuka pintu bilik bersebelahan ruang tamu. Perayu kedua telah menutup pintu tersebut apabila melihat PW4 dan pasukannya. PW4 menyepak pintu bilik tersebut dan menyerbu dalam, diikuti oleh dua orang polis. Dalam bilik itu,

PW4 menemui perayu pertama dan ketiga duduk bersila atas lantai di hadapan beberapa barangan. Pada masa sama, PW4 melihat perayu pertama menjatuhkan pelekat haba (heat-sealer) ke lantai. Barangan di hadapan perayu pertama dan ketiga merupakan paket-paket plastik dan sebuah mangkuk, kedua-duanya mengandungi serbuk berwarna kuning disyaki heroin, sebuah mesin timbang dan pelekat haba. Ahli kimia telah mengesahkan bahawa serbuk dan butiran kuning dijumpai dalam paket plastik dan mangkuk mengandungi monoacetylmorphines, sejenis dadah berbahaya di bawah Bahagian III, Jadual Pertama Akta tersebut dan beratnya 61.1g. Ketiga-tiga perayu telah disabit dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Ini adalah rayuan mereka terhadap sabitan. Pembelaan asas perayu-perayu adalah berkaitan keadaan dan kejadian serbuan polis memasuki bilik tersebut.

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Peguam perayu-perayu berhujah bahawa ia memang menakjubkan yang perayu pertama dan ketiga sedang duduk apabila PW4 masuk ke bilik. Ini adalah satu persoalan fakta dan hakim perbicaraan yang bijaksana mendapati PW4 dan saksi pihak pendakwaan adalah saksi-saksi jujur dan memerintahkan tiada sebab untuk menolak testimoni mereka bahawa perayu-perayu pertama dan ketiga sedang duduk atas lantai semasa polis masuk ke dalam bilik. Tiada salah arah di pihak hakim yang bijaksana atau kegagalan untuk menimbangkan keterangan material semasa membuat penemuan fakta beliau. Hakim perbicaraan yang bijaksana mempunyai kelebihan melihat dan mendengar saksi-saksi tersebut dan tiada sebab untuk campur tangan dalam penemuannya (lihat perenggan 14–16).

(2) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Hakim perbicaraan telah memerintahkan bahawa terdapat bukti jelas yang perayu-perayu memiliki dadah tersebut. Berkaitan perayu kedua, hakim perbicaraan memutuskan bahawa kehadiran beliau dalam bilik itu dan penglibatan beliau menjurus kepada niat bersama yang menyebabkan beliau bersalah di bawah s 39B(1)(a) Akta tersebut dibaca bersama s 34 Kanun Keseksaan. Tiada salah arah di pihak hakim perbicaraan yang bijaksana tentang persoalan niat bersama sama ada dari segi undang-undang atau berdasarkan fakta (lihat perenggan 20–22); *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 dibeza.

(3) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Perayu-perayu ditemui dengan dadah dan perlengkapan membungkus dadah dalam bilik tersebut di mana hanya tiga daripada mereka hadir. Justeru itu, persoalan tentang milikan eksklusif bilik tersebut tidak material. Bahkan, persoalan sama ada perayu-perayu mempunyai milikan eksklusif dadah tersebut. Oleh itu, tiada merit dalam hujah pihak pembelaan bahawa kes pihak pendakwaan harus gagal kerana pihak pendakwaan tidak membuktikan perayu-perayu mempunyai milikan eksklusif bilik tersebut (lihat perenggan 29); *Mohan Singh a/l Lachuman*

Singh v Public Prosecutor [2002] 3 MLJ 291 dan *Pang Chee Meng v Public Prosecutor* [1992] MLJ 137 dibeza.

(4) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Walaupun paket-paket yang mengandungi dadah dihantar untuk kesan cap jari, tiada kesan cap jari mencukupi untuk analisis boleh dikesan. Juga, kesan cap tangan dan keratan kuku tidak diambil. Bukti sedemikian, jika ada, akan hanya menambah kepada bukti milikan lain yang ada. Tanpanya, ia tidak semestinya bermakna milikan tidak boleh dibuktikan. Berdasarkan bukti milikan sebagaimana yang ditemui oleh hakim perbicaraan yang bijaksana, kegagalan untuk memperoleh kesan cap jari yang memadai dari paket-paket tersebut untuk analisis dan kegagalan untuk mengambil kesan cap tangan dan keratan kuku tidak dalam apa cara memberi kesan kepada penemuan tentang penemuan milikan oleh hakim perbicaraan yang bijaksana tersebut (lihat perenggan 38–39).

(5) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Dalam satu kes pengedaran dadah, adalah penting untuk membuktikan bahawa bahan yang ditemui telah dihantar ke ahli kimia untuk analisis dan analisis tersebut telah menunjukkan bahawa ia adalah heroin atau dadah berbahaya yang lain. Oleh itu, rangkaian keterangan adalah lebih penting dalam tempoh dari masa penemuan hingga analisis selesai dilakukan oleh ahli kimia. Meskipun begitu, ia tidak semestinya bermaksud bahawa jika ekshibit itu diserahkan dari seseorang kepada seseorang lain, setiap dari mereka harus dipanggil untuk memberikan keterangan berhubung penyerahan itu atau jika rangkaian keterangan terputus, walaupun sehari, kes itu akan gagal. Hakikat terdapatnya lompang dalam rangkaian keterangan tidak semestinya bermaksud fakta tersebut tidak dibuktikan. Ia bergantung pada fakta dan keadaan setiap kes. Tempoh seterusnya untuk dipertimbangkan adalah dari masa bahan tersebut diterima balik dari ahli kimia sehingga ia dikemukakan dalam mahkamah. Rangkaian keterangan dalam tempoh kedua ini kurang pentingnya kerana tiada undang-undang menghendaki ekshibit yang ditemui itu dikemukakan dalam mahkamah atau jika ekshibit itu tidak dikemukakan di mahkamah, kes pihak pendakwaan seharusnya gagal. Kes pihak pendakwaan boleh atau tidak gagal bergantung pada fakta dan keadaan setiap kes. Di sini, hakim perbicaraan yang bijaksana telah membicarakan dengan panjang lebar persoalan tentang rangkaian keterangan yang terputus dan memutuskan bahawa tiada merit kepada hujah itu bahawa terdapat satu rangkaian keterangan yang terputus dari hari dadah tersebut dirampas sehingga tarikh perbicaraan (lihat perenggan 41–45).

(6) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Hakim perbicaraan yang bijaksana telah membuat penemuan milikan dadah yang sah ke atas perayu-perayu pertama dan ketiga dan tanggapan pengedaran di bawah s 37(da)(iiia) Akta tersebut telah digunakan terhadap perayu-perayu pertama dan ketiga. Oleh itu, adalah tidak

betul untuk mengatakan bahawa hakim perbicaraan yang bijaksana adalah salah kerana bergantung pada anggapan dalam s 37(d) Akta tersebut untuk membuat penemuan milikan dan kemudian bergantung kepada anggapan di bawah s 37(da) untuk pengedaran (lihat perenggan 55, 57).

(7) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Jumlah sepuluh peratus yang diperuntukkan dalam s 37(j) Akta tersebut merujuk kepada bilangan bekas dan bukan berat kesemua dadah yang ditemui atau berat kesemua sampel yang diambil. Tiada peruntukan dalam Akta tersebut menghendaki sekurangnya sepuluh peratus daripada berat keseluruhan bahan yang dipersoalkan dikurangkan bagi tujuan analisis tersebut. Satunya masa perkataan-perkataan 'ten per centum' timbul dalam Akta tersebut adalah dalam s 37(j) Akta tersebut dan perkataan-perkataan tersebut merujuk kepada 'receptacles' di mana dadah tersebut terkandung dalam beberapa bekas dan bukan untuk timbangan (lihat perenggan 68, 82–83); *Au Ah Lin v Public Prosecutor* [1963] MLJ 365 dan *Public Prosecutor v Lam San* [1991] 3 MLJ 426 diikut; *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 dan *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 diikut.

(8) (oleh **Abdul Hamid Mohamad** dan **Denis Ong HHMR** bersetuju) Hakim perbicaraan yang bijaksana tidak membuat salah arah dari segi undang-undang. Beliau telah menimbangkan keterangan kedua-duanya bagi pihak pendakwaan dan pihak pembelaan dengan teliti dan telah memberikan alasan beliau kenapa beliau menerima atau tidak keterangan tertentu dan telah dengan betul tiba kepada keputusan sebagaimana beliau buat. Beliau mempunyai kelebihan melihat dan mendengar saksi-saksi tersebut. Tiada alasan untuk campur tangan dengan penemuan beliau atau keputusan muktamadnya (lihat perenggan 97).

(9) (oleh **Abdul Aziz Mohamad HMR** menentang) Hakim perbicaraan mendapati bahawa pihak pembelaan gagal untuk menimbulkan satu keraguan munasabah dalam kes bagi pihak pendakwaan kerana pembelaan tersebut hanya satu penafian. Jika hakim perbicaraan memaksudkan 'mere denial' sebagai pembelaan yang tidak disokong oleh keterangan berasingan atau kukuh, maka beliau adalah salah untuk menolak pembelaan tersebut oleh sebab alasan itu. Ini adalah kerana kejadian-kejadian tersebut memang telah berlaku sebagaimana yang didakwa oleh ketiga-tiga perayu, kejadian-kejadian tersebut tidak bersifat berasingan atau kukuh untuk menyokong keterangan untuk digunakan oleh perayu-perayu dalam apa carapun. Ia adalah satu kes bagaimana seseorang itu melihat sesuatu kes. Sebaliknya, jika apa yang hakim perbicaraan yang bijaksana maksudkan dengan 'mere denial' adalah bahawa beliau mendapati cerita pembelaan sukar diterima, maka beliau sepatutnya memberikan alasan beliau dalam penemuannya, yang mana beliau tidak berbuat demikian (lihat perenggan 105); *Mohamad Radhi bin Yaakub v Public Prosecutor* [1991] 3 MLJ 169 diikut.

(10) (oleh **Abdul Aziz Mohamad HMR** menentang) Perayu-perayu telah mendakwa bahawa sebuah beg dompet hitam dan bungkusan kertas mengandungi dadah dijumpai oleh pihak polis di bilik ruang tamu. Hakim perbicaraan membuat satu penemuan bahawa beg dompet hitam dan bungkusan kertas mengandungi dadah itu tidak wujud. Bagaimanapun, beliau tidak mengatakan sama ada beliau mendapati dakwaan perayu-perayu itu bukan hanya tidak benar tetapi juga tidak mungkin. Penolakan hakim perbicaraan terhadap tuntutan perayu-perayu berkaitan beg dompet dan bungkusan kertas mungkin dilihat sebagai satu-satunya alasan yang beliau berikan dalam penemuan yang pembelaan tersebut adalah tidak mungkin. Tiada alasan diberikan yang menjurus kepada keadaan tersebut, iaitu keadaan semasa polis masuk ke bilik itu. Hakim perbicaraan telah gagal untuk memberikan alasan yang mencukupi kerana mendapati cerita pihak pembelaan gagal untuk membuktikan satu keraguan munasabah ke atas kes pihak pendakwaan (lihat perenggan 108, 111).

(11) (oleh **Abdul Aziz Mohamad HMR** menentang) Terdapat dua keadaan penting dalam keterangan bagi pihak pendakwaan yang sesuai untuk dipertimbangkan dalam menentukan sama ada cerita pihak pembelaan berkemungkinan. Pertama, sememangnya suasana tentunya bising sebelum sembilan orang anggota polis masuk ke dalam ruang tamu itu, Tambahan pula, salah seorang daripada mereka telah digigit oleh seekor anjing diluar rumah. Semasa pihak polis masuk ke ruang tamu, terdapat sepuluh lelaki India dalam bilik itu dan PW4 telah menjerit 'polis' dalam suara yang lantang, Dalam keadaan sedemikian, perayu-perayu pertama dan ketiga sepatutnya sedar akan kehadiran pihak polis dan agak pelik jika mereka sedang duduk bersila menghadap dadah dalam bilik sebelum polis tiba, dan tetap berada dalam kedudukan itu semasa pihak polis menyerbu masuk. Ini perlu dipertimbangkan secara serius kerana meskipun perayu-perayu pertama dan ketiga hanya akan mempunyai empat atau lima saat untuk bertindak selepas mengetahui kehadiran pihak polis, reaksi biasa seseorang dalam situasi sedemikian akan bertindak mengikut naluri dengan serta-merta. Seseorang itu akan serta-merta menjauhkan diri dalam pembabitan dadah itu. Namun hakim perbicaraan menolak perkara ini berasaskan bahawa PW4 dan saksi pihak pendakwaan yang lain kelihatan seperti saksi-saksi yang boleh dipercayai. Untuk menerimanya sebagai suatu yang benar melampaui keraguan munasabah, untuk menganggap tiada keraguan tentang kebenarannya, seseorang itu perlu ada alasan untuk menerimanya sebagai suatu yang boleh dipercayai dalam keadaan sedemikian (lihat perenggan 112–113).

(12) (oleh **Abdul Aziz Mohamad HMR** menentang) Kedua, terdapat keterangan bertentangan berhubung apa yang perayu pertama sebenarnya lakukan semasa pihak polis masuk ke dalam bilik itu. Keterangan menunjukkan bahawa PW4 adalah orang pertama yang masuk, diikuti oleh seorang anggota polis lain, Duraiyappa. PW4 mengatakan bahawa beliau melihat perayu pertama menjatuhkan satu pelekat haba ke atas

lantai. Duraiyappa, sebaliknya berkata bahawa beliau melihat perayu pertama memasukkan sejenis serbuk ke dalam paket plastik kecil. Hakim perbicaraan telah menyatakan bahawa percanggahan keterangan ini tidak memprejudiskan kes pihak pendakwaan dan bahawa apa yang penting adalah sama ada bahan-bahan yang mengandungi dadah itu adalah dadah yang terdapat di hadapan perayu pertama. Hakim perbicaraan seterusnya menyatakan bahawa fakta yang menunjukkan terdapat perbezaan dalam apa yang dua saksi tersebut katakan mereka lihat bukanlah satu pemalsuan. Walaupun adalah benar bahawa percanggahan kecil pasti wujud dalam keterangan saksi-saksi yang berbeza tentang perkara yang sama dan bahawa apabila keterangan dipalsukan saksi-saksi tersebut mungkin akan memberikan keterangan yang sama dan terperinci, percanggahan keterangan dalam kes ini bukan tentang satu perkara yang tidak penting. Bahkan, ia adalah berhubung satu aktiviti yang pihak pendakwaan bergantung pada, selain faktor lain, untuk membuktikan pengetahuan bagi tujuan membuktikan milikan dadah. Akhirnya, hakim perbicaraan menyatakan bahawa beliau lebih berpihak kepada keterangan PW4 kerana beliau adalah orang pertama masuk ke bilik. Alasan untuk menerima testimoni PW4 untuk menunjukkan apa yang sebenarnya berlaku sememangnya tidak kukuh. Walaupun PW4 telah masuk ke dalam bilik itu dahulu, ia adalah kerana beliau berada di hadapan Duraiyappa. Mereka berdua telah masuk ke dalam bilik pada masa yang sama dan pada saat itulah mereka nampak apa yang berlaku. Apabila dua orang yang berpaling perhatian mereka pada masa yang sama memberikan fakta yang berbeza tentang apa yang mereka lihat, tiada alasan secara logik atau biasanya untuk mempercayai seorang yang berada di hadapan seorang yang lain dengan penglihatan yang jelas (lihat perenggan 114–116).

(13) (oleh **Abdul Aziz Mohamad HMR** menentang) Walaupun di penutup kes pihak pendakwaan hakim perbicaraan yang bijaksana mendapati dua keadaan tersebut tidak menjejaskan kes pendakwaan, selepas mendengar keterangan pihak pembelaan, beliau sepatutnya mengujinya terhadap keterangan pihak pendakwaan bagi tujuan menentukan sama ada cerita pembelaan berkemungkinan, dan dengan berbuat demikian beliau sepatutnya ingat keadaan yang telah wujud sebelum keterangan pihak pendakwaan dan membuat pertimbangan mengenainya. Tetapi hakim perbicaraan tidak memberikan sebarang alasan atau alasan yang mencukupi, dan oleh itu ia tidak mungkin mempunyai apa-apa alasan atau alasan yang mencukupi untuk mendapati bahawa pembelaan itu tidak berkemungkinan dan telah gagal untuk membuktikan satu keraguan munasabah ke atas kes pihak pendakwaan. Oleh itu, menurut *Mohamad Radhi bin Yaakob v Public Prosecutor*, ketiga-tiga perayu tidak sepatutnya disabitkan (lihat perenggan 117).

(14) (oleh **Abdul Aziz Mohamad HMR** menentang) Andaian dalam s 37(j) Akta tersebut hanya boleh digunakan di mana bahan itu 'is contained in a number of receptacles'. Tambahan pula, jika s 37(j) Akta tersebut hanya akan digunakan dalam situasi untuk mendapat manfaat daripada

andaian itu, ahli kimia perlu membuat analisis ke atas 'samples of the contents of a number not less than ten per centum of such receptacles'. Sampel-sampel yang akan dianalisis adalah sampel-sampel yang mengandungi beberapa bekas. Bilangan bekas tersebut mestilah tidak kurang daripada sepuluh peratus daripada jumlah keseluruhan bekas itu. Sepuluh peratus itu merujuk kepada bilangan bekas. Ahli kimia perlu mengambil sampel-sampel daripada beberapa bekas. Seksyen 37(j) Akta tersebut tidak menetapkan jumlah sampel yang perlu diambil daripada setiap bekas dan dianalisis. Sepuluh peratus tersebut tidak menyatakan kuantiti sampel tersebut (lihat perenggan 121); *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 dan *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 tidak diikut.]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.
For cases on the break in the chain of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1324–1341.
For cases on Dangerous Drugs Act 1952 s 37(d), (da), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 169–184.
For cases on Dangerous Drugs Act 1952 s 37(j), (da), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 209–211.
For cases on Dangerous Drugs Act 1952 s 39B(1), (da), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 281–289.

Cases referred to

Au Ah Lin v PP [1963] MLJ 365 (folld)
Leong Bon Huat v PP [1993] 3 MLJ 11 (not folld)
Loo Kia Meng v PP [2000] 3 MLJ 664 (not folld)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Mohan Singh a/l Lachuman Singh v PP [2002] 3 MLJ 291 (distd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (distd)
PP v Lam San [1991] 3 MLJ 426 (folld)
PP v Poh Ah Kwang [2003] 3 AMR 664 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (distd)
Sunny Ang v PP [1966] 2 MLJ 195 (refd)
Toh Su Kwan v PP (refd)
Too Yin Sheong v PP [1999] 1 SLR 682 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 37(j), 39A, 61, First Schedule Part III
Excise Act 1961 ss 17(1), 75(1)
Penal Code s 34

Appeal from: Criminal Trial No 45–28 of 2000 (High Court, Kuala Lumpur)

Gurbachan Singh (Bachan & Kartar) for the frist and second appellants.
Suresh Thanabalasingam (Kuldip & Assoc) for the third appellant.
Abdul Wahab bin Mohamad (Attorney General's Chambers) for the respondent.

Denis Ong JCA:

[1] I have had the advantage of reading the judgments of both my learned brothers Abdul Hamid Mohamad and Abdul Aziz Mohamad in draft. I concur with the decision of Abdul Hamid Mohamad that this appeal be dismissed and the convictions and sentence confirmed for the same reasons expressed in his judgment.

Abdul Hamid Mohamad JCA:

[2] There are three separate appeals by the three appellants. However, even at the High Court they were referred to as the first, second and third accuseds and the appeal record also refer to them as the first, second and third appellants respectively. In this judgment I shall refer to them as first, second and third appellants, the first appellant being Gunalan a/l Ramachandran, the secondnd appellant being Ganesan a/l Haja Mohidin and the third appellant being Victor a/l Rajendran.

[3] Mr Gurbachan Singh appeared for the first and appellants and MrSuresh Thanabalasingam and Mr Kuldip Singh appeared for the third appellant. Deputy Public Prosecutor, Encik Abdul Wahab bin Mohamad appeared for the Public Prosecutor.

[4] As Mr Suresh, learned counsel for the third appellant adopted the submissions of learned counsel for the first and second appellants and his (Mr Suresh) brief submissions were on the same issues, I shall discuss the grounds of appeal and the submissions thereof on behalf of the three appellants together.

[5] All the three appellants were charged as follows:

> Bahawa kamu bersama-sama pada 3 Februari 1999, jam lebih kurang 10.25 malam, dibilik sebelah kanan sebuah rumah tidak bernombor Kg Sam Yoke, Jalan Sungai Besi, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 61.1 gram monoacetylmorphines dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(l)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[6] They were convicted and sentenced to death. They appealed to this court.

[7] Briefly, the facts as adduced by the prosecution are that on 3 February 1999 at about 10.25pm, a team of police officers led by Chief Inspector Rajendran a/l Kanesan (PW4) went to an unnumbered squatter house at Kampong Sam Yoke, Sungai Besi, Kuala Lumpur to conduct a raid. On arrival

at the house, PW4 found the door of the house open. They rushed inside. At the hall which was on the right side of the house, they found a group of 10 Indian males who were sitting and watching television. PW4 introduced himself and directed his men to arrest them.

[8] At that point of time, PW4 saw a male Indian (second appellant) opening the door of the room adjoining the hall. As soon as the second appellant saw PW4 and his team, the second appellant closed the door. PW4 pushed the door and when the second appellant pushed it back, PW4 kicked the door and rushed into the room followed by two of his men, ie PW6 and Detective Lans Corporal Ahmad Kamil (DLC Ahmad Kamil). Besides the second appellant, PW4 saw two more Indian males, ie the first appellant and the third appellant who were not wearing shirts sitting cross-legged on the floor in front of some 'barangan' (goods/utensils). At the same time, PW4 saw the first appellant dropping a heat-sealer on the floor. PW4 introduced himself as a police officer and directed PW6 and DLC Ahmad Kamil to hand-cuff the appellants. PW4 then conducted a search in the room in the presence of the three appellants and his two police officers. Resulting from the search, he seized the 'barangan' that he found on the floor where the first and the third appellants were sitting when he first entered the room. They are:

(i) one big transparent plastic packet containing yellow powder and 'ketulan' suspected to be heroin;

(ii) two transparent plastic packets which have been sealed, each packet containing two bundles of small plastic packets, each bundle containing 20 small plastic packets totaling 80 and each small plastic packet contained yellow powder and 'ketulan' suspected to be heroin;

(iii) one transparent plastic bowl containing yellow powder and 'ketulan' suspected to be heroin.

(iv) one metal container of Tong Kee Brothers Confectionery containing 56 sealed, small plastic packets each of which contained yellow powder and 'ketulan' suspected to be heroin;

(v) a transparent plastic packet containing one bundle of small plastic packets which were empty; (vi) one pink plastic packet containing empty transparent plastic packets;

(vii) a weighing machine with a brand name of 'Tanita';

(viii) one heat-sealer with a brand name of 'impulse' which was lighted;

(ix) a bunch of six keys;

(x) a pair of scissors black in colour.

[9] After seizing those things, PW4 conducted a search outside the room but could not find anything incriminating. The three appellants, all the Indian males arrested at the hall and all the things seized were taken to Sentul Police District Office.

[10] The chemist (PW2) confirmed that the yellow powder and granules found in the plastic packets and bowl contained monoacetylmorphines, a type of dangerous drugs under Part III, First Schedule of the Dangerous Drugs Act 1952 ('the Act') and the weight was 61.1g.

[11] The evidence of PW4 was confirmed by PW6.

[12] At the end of the prosecution's case, after hearing the submissions of learned counsel and the deputy public prosecutor, the learned Judge called upon all three appellants to enter upon their defence as charged. At the end of the case, after hearing the evidence adduced for the defence and the submissions of the learned counsel and the deputy public prosecutor, the learned judge found all the three appellants guilty as charged and convicted them.

[13] Mr Gurbachan Singh adopted his submissions in the High Court and went on to submit point by point which we shall deal with accordingly.

GROUND 8

[14] Learned counsel repeated the facts which I do not think I have to reproduce again and submitted that it was inherently incredible that the first and third appellants were sitting down when PW4 entered the room.

[15] This is a question of facts. The learned judge had discussed the evidence and dealt with the submission in his grounds of judgment:

> Mengenai dakwaan pihak pembelaan bahawa keterangan pihak pendakwaan berbentuk syak-wasangka sahaja, peguam OKT1 bertikai adalah tidak munasabah bagi OKT1 dan OKT3 masih terus duduk bersila berhadapan dengan barangan yang mengandungi dadah itu setelah mereka terdengar bunyi bising diluar bilik tersebut, setelah mereka mendengar orang diluar bilik tersebut teriak 'polis' dan setelah melihat OKT2 sedang tolak-menolak pintu bilik tersebut. SP4 dan SP6 menyatakan mereka ternampak OKT1 dan OKT3 sedang duduk bersila di atas lantai sebaik sahaja mereka memasuki bilik tersebut. SP4 dan SP6 juga telah menyatakan kejadian itu berlaku dalam beberapa saat sahaja. Saya dapat memerhati SP4 dan SP6 semasa mereka berada dalam kandang saksi dan berpendapat mereka merupakan saksi-saksi yang lurus dan berterus terang. Mereka telah memberi keterangan tentang apa mereka melihat dan setelah saya meneliti keterangan mereka dengan terperinci, saya berpendapat tidak wujudnya alasan bagi saya menolak keterangan mereka tentang kedudukan OKT1 dan OKT3 semasa mereka menyerbu masuk bilik tersebut.

[16] I do not find any misdirection on the part of the learned judge or failure to consider material evidence adduced in making his finding of facts. He had the advantage of seeing and listening the witnesses. I have no reason to interfere with his findings or decision.

GROUNDS 1 AND 2

[17] Learned counsel submitted that there was a non-direction by the learned judge in that he did not consider that it was a joint charge. He submitted that the prosecution must prove joint possession and joint trafficking.

[18] First, it is not correct to say that the learned judge did not consider the question of joint charge. The learned judge, in his grounds of judgment, reproduced the arguments of learned counsel for the accused and the arguments of the deputy public prosecutor. Then he discussed at length the law on s 34 of the Penal Code, citing local, Singaporean and Indian authorities. He discussed the three ingredients of s 34 under three heads as was done by Karthigesu JA (Singapore) in *Too Yin Sheong v Public Prosecutor* [1999] 1 SLR 682 (CA (Singapore)), ie: (i) the common intention of all; (ii) in furtherance of the common intention; and (iii) participation in the criminal act.

[19] After discussing the law and the evidence under the first head, the learned judge concluded:

> Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, paket-paket plastik kosong, alat penimbang dan alat 'heat-sealer' menyokong inferens ini.

[20] Regarding the second and third heads (or ingredients), after referring to various authorities, the learned judge made a specific finding regarding the second appellant. This is because, earlier on he had already ruled that from direct evidence adduced by the prosecution against the 1st and the third appellant (who were sitting down on the floor shirtless with the drug), the heat-sealer which was still burning and the weighing machines with sealed and empty packets in front of them were clear proof that they were in possession of the drugs.

[21] So, it was in respect of the second appellant who was standing behind the door when PW4 pushed the door that he had to state his clear findings which he did, in these words:

> Dalam kes di hadapan saya ini, kehadiran fizikal OKT2 di tempat kejadian itu, dalam bilik tersebut tidak dipertikaikan. Ia telah cuba menghalang SP4 memasuki bilik tersebut walaupun ia sedar SP4 adalah seorang anggota polis. Kehadiran OKT2 di bilik tersebut bersama penyertaannya bagi mencapai niat bersama mereka semuanya, membuatnya bertanggungan di bawah seksyen 39B(1)(a) Akta itu dibaca dengan seksyen 34 Kanun Keseksaan.

[22] I do not see any misdirection on the part of the learned judge on the issue of common intention whether in law or on facts. His findings are as clear as they can be and, in my view, correct too.

[23] One word should be said about the case of *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314. In that case, the police saw a bundle thrown out of the left window of a moving car that they were following. A policeman stopped his car and picked up the bundle containing drugs. The other police cars continued to follow the said car which later stopped after it met with an accident. The police found the two appellants, husband and wife, in the car and also a 15-month-old child in the arms of the mother, the second appellant. It was held:

(2) It is essential in relying on s 34 of the Code that there should be evidence of a common intention or evidence from which such a common intention can be inferred. The mere fact of a bundle being thrown out of a car is not evidence of common intention or evidence from which common intention can properly be inferred.

(3) In this case, there was no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs, and the further presumption that they must have known that the drugs were cannabis. Until this can be proven, the presumption under s 37(da) of the Act that the appellants were trafficking in dangerous drugs did not arise.

[24] The facts of the two cases are poles apart. The decision in that case must be understood in relation to the facts of that case. A bundle containing drug was seen thrown out of a moving car. There were two persons in the car, the husband and the wife (and also the child). It is true that the bundle was thrown out of the left window, the side the wife was sitting. But, it was not known who between them threw it. She was holding the child and he was driving. There was nothing to connect the bundle with either of them and it could also be a case where one of them had no custody and control of the bundle and may not have knowledge of the content which was in a bundle. Or, it could also be that both of them had the custody and control and the knowledge of the drug in the bundle before it was thrown away.

[25] The instant appeal is very different. The facts have been reproduced and requires no repetition. In my judgment, this ground fails.

GROUNDS 3, 4 AND 5

[26] It was argued that the prosecution did not prove who was the owner and the occupier of the house and the room. There were 13 people in the house, 10 in the hall and three in the room. There was free access. It was put to PW3 that the first appellant was the owner of the house. The prosecution's case must fail because the prosecution did not prove exclusive possession of the room by the appellants. The appellants were merely present in the room in which the drugs were found. Learned counsel cited the cases of *Mohan Singh a/l Lachuman Singh v Public Prosecutor* [2002] 3 MLJ 291 (CA) and *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 (SC).

[27] Let us look at *Pang Chee Meng v Public Prosecutor* first. In that case, the police laid an ambush and arrested the accused near the place where he was known to be living. Upon arrest, the accused allegedly gave information which led to the discovery of heroin, the subject matter of the charge. The drugs were found in a room he was known to be living in. At all time, after his arrest, the accused denied any knowledge of the drugs or that he gave information. It was in evidence that three other named persons also had access to the room. In the circumstances, no wonder the Supreme Court found that the learned Judicial Commissioner who tried the case was manifestly wrong to find as a fact that the appellant had exclusive possession of the room.

[28] In *Mohan Singh a/l Lachman Singh v Public Prosecutor*, a police raid was conducted at about 5.30pm at a flat. There were three males in that flat.

The appellant was one of them. Two keys were recovered on the appellant's person. The appellant then led the police party to another flat. The police officers gained access into the second flat by using one of the two keys to open the padlock that secured the collapsible grill at the entrance of the flat. The flat had six rooms. The police party and the appellant proceeded to one of the rooms. The police used the second key to gain access to that room. In the room, they recovered the drugs. In the circumstances, this court found that it would be wholly unsafe to convict the appellant.

[29] On the facts, the two cases are also very different from the instant appeal. In the instant appeal, the appellants were found with the drugs and paraphernalia in a room where only the three of them were present and entry into it by the police was resisted. The question of exclusive possession of the room is not material. The issue is whether they had the exclusive possession of the drugs. This ground too fails.

GROUND 15

[30] It was submitted that there was no evidence of knowledge of the drugs. Without knowledge there could be no possession. Being able 'to see' the drugs 'does not amount to possession and knowledge', learned counsel submitted. Learned counsel referred us to *Public Prosecutor v Poh Ah Kwang* [2003] 3 AMR 664 (HC) and *Toh Su Kwan v Public Prosecutor* which was only referred to by the learned judge in *Public Prosecutor v Poh Ah Kwang* from a 'typed 10 page ex tempore judgment' of this court. We do not have the full judgment. The passage of the purported judgment in *Toh Su Kwan v Public Prosecutor* reproduced by the learned judge in *Public Prosecutor v Poh Ah Kwang* is not sufficient to enable us to know exactly the decision of this court in *Toh Su Kwan v Public Prosecutor* and the grounds thereto.

[31] In any event, there is no shortage of cases on possession and knowledge in drug trafficking cases either by this or the highest courts in this country. The law is well established and requires no repetition. Knowledge is to be inferred from the facts and the surrounding circumstances of a case.

[32] In the instant appeal, the learned judge, citing various authorities, dealt at length on the question of possession and knowledge. This is what the learned judge said:

> Dalam kes di hadapan saya ini, saya mendapati keterangan langsung yang dikemukakan oleh pihak pendakwaan dengan jelas menunjukkan OKT1 dan OKT3 ada kawalan fizikal ke atas dadah itu dan ada pengetahuan tentang kewujudan dadah itu sendiri. Dadah yang terdapat dalam mangkuk plastik tersebut berada dalam keadaan terbuka dan boleh dilihat dengan jelas. Dadah yang terdapat dalam peket-peket plastik lut sinar itu juga boleh dilihat dengan jelas dengan mata kasar. OKT1 dan OKT3 sedang duduk bersila dalam keadaan tidak berbaju berhadapan dengan dadah itu dan barangan lain termasuk alat 'heat-sealer' itu. Fakta-fakta ini dengan jelas menunjukkan OKT1 dan OKT3 ada milikan fizikal ke atas dadah itu. Keterangan juga menunjukkan alat 'heat-sealer' itu masih terpasang dan berhaba yang menggambarkan alat itu sedang digunakan untuk tujuan mengsil sesuatu. Ini menggambarkan mereka sedang mengendalikan dadah itu termasuk barangan

lain itu dan sedar tentang kewujudan dadah itu dan ada pengetahuan bahawa mereka sedang mengendalikan barang salah. Pada pendapat saya, peket-peket plastik kecil yang kosong itu serta alat penimbang dan 'heat-sealer' itu merupakan barangan dan alat yang digunakan untuk menyusun dan membungkus dadah itu ke dalam peket-peket plastik kecil itu. Mendasarkan apa yang dibincangkan kini, adalah menjadi dapatan saya bahawa pihak pendakwaan telah membuktikan dadah itu ada dalam milikan OKT1 dan OKT3 dibilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam.

[33] Regarding the second appellant, the learned judge recounted his involvement as follows:

Seperti telah dibincangkan di atas, keterangan langsung menunjukkan hanya OKT1 dan OKT3 serta OKT2 berada dalam bilik pada masa itu. Mengenai kedudukan OKT2, keterangan menunjukkan sebaik sahaja SP4 dan pasukannya menyerbu masuk rumah tersebut dan berada di ruang tamu, OKT2 yang berada dalam bilik tersebut, telah membuka pintu bilik tersebut dan apabila ia melihat SP4 dan anggota pasukannya, ia telah tutup pintu itu dengan serta merta dan cuba menahan pintu itu apabila SP4 hendak memasuki bilik tersebut …

[34] The learned judge then went on to discuss the law on s 34 of the Penal Code and referring to the evidence, made the following conclusions:

Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, peket-peket plastik kosong, alat penimbang dan alat 'heat sealer' menyokong inferens ini.

[35] and, later:

Dalam kes di hadapan saya ini, kehadiran fizikal OKT-OKT ditempat kejadian itu, dalam bilik tersebut tidak dipertikai. la telah cuba menghalang SP4 memasuki bilik tersebut, Walau pun ia sedar SP4 adalah seorang anggota polis. Kehadiran OKT2 di bilik tersebut bersama dengan penyertaannya bagi mencapai niat bersama mereka semuanya membuatnya bertanggungan di bawah seksyen 39B(1) (a) Akta itu dibaca bersama seksyen 34 Kanun Keseksaan.

[36] It is true that the learned Judge did not say in so many words, in respect of the second appellant as he did in respect of the first and third appellants that he found that there was direct evidence ('keterangan langsung') that the second appellant had the physical control of the drug and knowledge of its existence. However, invoking s 34 of the Penal Code and in view of the evidence of the involvement of the second appellant was also 'bertanggungan' (liable).

[37] I am satisfied that the learned judge was justified in doing so. This ground fails.

GROUNDS 6 AND 17

[38] It was submitted that there was no nexus between the appellants and the drug. Even though the packets containing the drug were sent to PW7 for finger printing impression, no finger printing impression sufficient for analysis could be lifted. Hand swaps and nail clippings were not taken.

[39] In my view, such evidence, if any, would add to other available evidence of possession. Without it, it does not necessarily mean that possession is not proved. In view of what I have said earlier regarding proof of possession as found by the learned judge on the facts and in the circumstances of this case, the inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings does not in any way affect that finding of possession by the learned judge. This ground too fails.

GROUNDS 7 AND 10

[40] Learned counsel then tried to cast doubts on the exhibits. He traced the history of the movement of the exhibits from the time of recovery until the trial. He drew our attention to the fact that the drug was recovered on 3February 1999. On 15 March, PW5 (the Investigating Officer) sent the exhibits to PW7, the police finger print expert. They were taken back on 23August 1999. On 24 September, the exhibits were sent to the chemist which was sevenmonths and 20 days after the recovery. On 18 February 2000, the exhibits were taken back from the chemist. In April 2000, PW5 was transferred out. He did not send the exhibits to the store. He was interdicted in August 1999. There was no handing over until 28 March 2002 when the exhibits were handed to PW8 by PW5. In the meantime, there was another officer who took over the case. The exhibits were not handed to Inspector Azizan Said. Three exhibits got lost. Chief Inspector Azizan Said was not called as a witness. Thus there was a serious break in the chain of evidence.

[41] First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.

[42] The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed

by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

[43] The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs and so on. Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall.

[44] In this case, the learned judge dealt at length on the issue of break of chain of evidence. First, he reproduced the submission of the learned counsel that covered three pages of the judgment. Then he narrated the chronology in great detail (which I do not think it is necessary to reproduce) and concluded:

> Setelah saya meneliti fakta-fakta di atas, saya berpendapat dakwaan peguam OKT1 bahawa terputusnya rangkaian keterangan mengenai barangan kes tidak berasas. Peguam bertikai Ketua Inspektor Azizan Said tersebut tidak dipanggil untuk memberi keterangan ataupun ditawarkan kepada pihak pembelaan. Saya mendapati keterangan menunjukkan barangan kes tidak pernah diserahkan kepada Ketua Inspektor Azizan Said tersebut. Ini jelas dari keterangan SP5 dan SP8. SP5 menyatakan ia mengeluarkan barangan kes dari kabinet besinya di pejabat lamanya di Bahagian Narkotik, Ibu Pejabat Polis Daerah Dang Wangi pada 28 Mac 2002 dan menyerahkan barangan itu kepada SP8. SP8 mengesahkan ini dan menyatakan kes di Ibu Pejabat Polis Daerah Dang Wangi pada hari yang sama. Ini jelas menunjukkan barangan kes tidak pernah diserahkan kepada Ketua Inspektor Azizan Said seperti didakwa dan oleh itu saya tidak dapat memahami kenapa pegawai itu perlu memberi keterangan tentang barang kes ataupun hendaklah ditawarkan kepada pihak pembelaan. Di samping itu nama pegawai itu tidak tercatat dalam senarai saksi-saksi yang dikemukakan oleh timbalan pendakwa raya pada permulaan perbicaraan ini.
>
> Mengenai tiga barang kes yang hilang itu, saya berpendapat ketakwujudan barangan itu tidak menjejaskan kes pihak pendakwaan. Ketiga-tiga barangan itu boleh dilihat dengan jelas dalam gambar barang kes, iaitu ekshibit P13 yang diambil pada 15 Februari 1999. Di samping itu, barangan itu jelas tidak mengandungi dadah itu. Keterangan menunjukkan peket-peket plastik itu adalah kosong semasa

SP4 merampasnya. Dadah juga tidak dijumpai berada di atas alat penimbang itu. Kesimpulannya saya berpendapat dakwaan pihak pembelaan bahawa rangkaian keterangan terputus tidak berasas.

[45] I agree with him that the argument has no merits. There is no reason why Chief Inspector Azizan Said should be called as a witness or at least offered to the defence as the exhibit was never handed over to him. He also found that there was no break in the chain of evidence whatsoever, from the day it was seized until the date of trial. Regarding the missing exhibits, they did not contain any drug. They were empty plastic packets and the weighing machine. Their existence could be seen from the photographs, not to mention oral evidence.

[46] Under this head, it was also submitted that there was contradictory evidence as to whether the offending exhibit was in granular form or powdery. PW4 in his evidence at first said that it was 'serbuk dan ketulan' but later only used the word 'serbuk'. PW5 and PW7 described it as 'serbuk'.

[47] I have re-read the evidence of PW4. I find that the record shows that on numerous occasions in his evidence, PW4 used the words 'serbuk dan ketulan'. Even if he had at times, used the word 'serbuk' only (which I could not find) that would not make any difference.

[48] Record of PW5's evidence shows that the words 'serbuk and ketulan' were consistently used even though the words 'serbuk ketulan' and 'serbuk' were also used.

[49] Upon perusing the record of the evidence of PW7, I find that such words as 'ketulan serbuk', 'serbuk', 'serbuk-serbuk kecil', 'serbuk-serbuk' were used or recorded.

[50] In fact, even learned counsel for the second accused himself, in his cross-examination, is recorded to have used such words as 'ketulan/serbuk', 'serbuk kecil' and 'serbuk'.

[51] This point is too trivial for this court to waste its time on.

[52] Finally, under the same head, it was argued that there was discrepancy in the weight of the drug. In the charge first preferred before the magistrate's court the weight of the drug was stated as 880g. From the evidence of the chemist (PW2) at pp 101 and 102 of the appeal record, the total net weight (by learned counsel's own calculation, I believe, as the chemist did not give the total weight that was given by the learned counsel) is 1211.3g but at p 98 and 99, the total net weight of the yellow granular and powdery substance is 779g.

[53] Actually, the weight of 880g stated in the charge before the magistrate's court is the gross weight of the suspected drug contained in the plastic packets as weighed by the police. The exhibits had not been analysed by the chemist yet. We cannot expect the initial weighing by the police to be as accurate as that done by the chemist. Regarding the alleged total 1211.3g, while writing

this judgment, I did my own calculation and I found it to be 779.08g, not 1211.3g as alleged by the learned counsel. Regarding the total of 779g, that is correct. The difference of 0.08g with the total at pp 101 and 102 is because the decimal point was omitted. The difference of 0.08g is too small to cast any doubt on the evidence of weight of the yellow granular and powdery substance. In any event, that is not the weight for which the appellants were charged. They were charged with trafficking of 61.1g monoacetylmorphines. That is the weight given by the chemist. So, this ground has no merits.

GROUND 14

[54] It was also submitted that the learned judge had wrongly invoked the presumptions under s 37(d) and (da) of the Act, referring to *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. This, according to him, was because there was no direct evidence of possession. At the worst, only presumption (d) could be invoked.

[55] I have perused the grounds of judgment of the learned judge. After dealing with the law on possession at length, the learned judge clearly made a definite finding of possession of the drug by the first and third appellants. This is what he said:

> Dalam kes di hadapan saya, saya mendapati keterangan langusng yang dikemukakan oleh pihak pendakwaan dengan jelas menunjukkan OKT1 dan OKT3 ada kawalan fizikal ke atas dadah itu dan ada pengetahuan tentang kewujudan dadah itu sendiri.

[56] He then went on to give his reasons for it and continued:

> Mendasarkan apa yang dibincangkan kini, adalah menjadi dapatan saya bahawa pihak pendakwaan telah membuktikan dadah itu ada dalam milikan OKT1 dan OKT3 di bilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam. SP2 telah mengesahkan bahan yang terdapat dalam peket-peket plastik itu dan mangkuk plastik itu adalah monoacetylomorphines adalah sejenis dadah berbahaya yang disenaraikan di bawah Bahagian III, Jadual Pertama kepada Akta itu. Berdasarkan demikian adalah menjadi dapatan saya bahawa anggapan pengedaran di bawah seksyen 37(da)(iiia) Akta itu telah timbul terhadap OKT1 dan OKT3. Seperti telah diturunkan di atas seksyen 37(da)(iiia) itu memperuntukkan bahawa mana-mana orang yang didapati ada dalam pemilikannya 15 gram atau lebih berat monoacetylmorphines selain dari menurut kuasa Akta atau mana-mana undang-undang bertulis, hendaklah sehingga dibuktikan sebaliknya, dianggapkan sebagai mengedarkan dadah tersebut.

[57] So it is not correct to say that the learned judge relied on presumption (d) to make a finding of possession and then relied on presumption (da) for trafficking.

[58] Regarding the second appellant, the learned judge's finding was reproduced in the discussion under ground 16.

[59] This ground too fails.

GROUND 18

[60] Referring to the grounds of judgment at pp 39 and 69, learned counsel submitted that the learned judge found the appellants guilty 'by inference'. This is what the learned Judge said at p 39 of the appeal record:

> Berdasarkan keterangan di atas, *timbalan pendakwa raya mendesakkan* ketiga-tiga tertuduh sebenarnya bukan sahaja mempunyai niat bersama untuk berurusan dengan dadah itu tetapi sebenarnya *inferens boleh dibuat* bahawa ketiga-tiga tertuduh sedang berurusan dengan dadah itu dengan cara membungkus atau mengira peket-peket yang mengandungi dadah itu. (Emphasis added.)

[61] That is the submission of the deputy public prosecutor, not the learned judge's finding.

[62] At p 69 of the appeal record, the learned judge said:

> Dalam kes di hadapan saya ini, adalah jelas bahawa niat bersama ketiga-tiga tertuduh menurut rancangan yang telah mereka buat terlebih dahulu adalah untuk mengendalikan dadah itu di bilik tersebut. Wujudnya barangan seperti dadah yang berada dalam keadaan terbuka, peket-peket plasitk yang kosong alat penimbang dan alat 'heat-sealer' menyokong *inferens* ini. (Emphasis added.)

[63] It is true that this is his finding. It is true that he used the word 'inference'. But, the inference is in respect of the common intention which he drew from the facts. How else could common intention be proved if not by inference from the facts and the surrounding circumstances of the case?

[64] This ground fails.

GROUND 19

[65] Learned counsel next attacked the evidence of the chemist (PW2). He submitted that there was no evidence of how many random samples PW2 took and what was the weight. He relied on *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 (CA).

[66] On this issue, it is necessary to take a close look at the relevant provisions of the Act and the decided cases again.

[67] Section 37(j) of the Act provides:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, the contents of all the receptacles consist or contain the same proportion of such drug.

[68] What is obvious is that the 10% refers to the number of receptacles, not the total weight of the drug found or the total weight of the samples taken.

[69] What do the cases say?

[70] First, we shall begin, for comparison, with the case of *Au Ah Lin v Public Prosecutor* [1963] MLJ 365 (FC). In that case, the appellant was charged under ss 17(1) and 75(1) (a) of the Excise Act 1961. Section 61 of the Act provides:

> When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, and the Court shall presume that the goods contained, in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

[71] Thomson LP, delivering judgment of the court said:

> In our view section 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words 'ten per centum' refer to the packages, not to the contents of each package.

[72] In my view, the words used in Act under which the appellants are charged are even clearer than those used in the Excise Act 1961.

[73] I shall now discuss the cases under the Act. In *Public Prosecutor v Lam San* [1991] 3 MLJ 426 (SC) the respondent was charged for trafficking 34.81g of heroin which was found in a package at a house that was raided by the police. The learned judge found the evidence of the chemist 'sketchy' and 'unsatisfactory' and doubted the accuracy of the weight of the heroin analysed. It is to be noted that the chemist said that the weight of the greyish brown substance found in the plastic packet was 75.18g which on analysis, he found to contain 34.81g nett heroin.

[74] In cross-examination, he said:

> From ex 8C I cannot remember exactly but I think I took out about 100 grams for the purpose of analysis.
>
> There is no record in my work sheet of my having taken out a quantity of the substance for my analysis.

[75] In re-examination, he said:

> For the purpose of analysis the practice is to take out more than 10% of the weight of the sample for analysis.

[76] Hashim Yeop A Sani CJ (Malaya), delivering the judgment of the court, said:

> Looking at the evidence of the chemist in its totality, we found it difficult to accept the doubt of the learned judge at the close of the prosecution case to be a doubt arrived at on a rational basis. PW5 was a highly qualified chemist who had served the Department of Chemistry for 22 years and had testified as an expert witness in many court cases.

As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy v PP* [1987] 1 MLJ 492 where in a passage at p 496F, Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:

> 'We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is not necessity for him to go into details of what he did in the laboratory, step by step.'

Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

In our view, the evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

The evidence of the chemist must be looked at in its totality. Seen in its totality, the evidence of the chemist in his case is not sketchy at all. There is no need for him to say what instrument he used for the purpose of the analysis or that the instrument was in good working condition as we have to assume until the contrary is shown that he had the proper instrument to carry out his work. In this case he had even gone to the extent of giving a margin of error and had given the benefit of the doubt to the respondent.

[77] Confining myself to the issue of weight of the samples taken for analysis in that case, it must be noted that the chemist admitted that there was no record in his work sheet of the quantity or weight of the substance he took for analysis. He said he thought he took about 10% of the weight for the purpose. In spite of that the Supreme Court held that the evidence of the chemist including that of the weight of the cannabis should be accepted.

[78] In *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 dried leaves believe to be cannabis was recovered in a bag that was carried by the appellant. While the total weight of the plant material believed to be cannabis was 793.85g, the total weight samples taken for analysis was 'more than 10%' of the nett weight of 793.85g of plant material. The chemist did not take any sample from the balance of the plant material which formed a very substantial part of the whole, for analysis. The main ground of appeal was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s 2 of the Act.

[79] Edgar Joseph Jr SCJ, delivering the judgment of the court said:

It is obvious that from the extracts of the testimony of the chemist, the following plain facts emerge:

First, the total weight of the plant material said to be cannabis was 793.85g.

Second, the total weight of the samples taken for analysis was 'more than 10% of the net weight of 793.85g' of plant material.

Third, the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis.

Now, what does 'more than 10% of the net weight of 793.85g' mean? Does it mean 11% or 12% or more than that? Not to put too fine a point on it, the expression 'more than 10%' is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.

To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% — and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning — then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s 37(da) of the Act.

It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it so say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

[80] Again, confining myself to the issue of weight, first it must be noted that the court made it very clear that what would be adequate quantities would depend on the particular circumstances of each case and the court did not consider that any useful purpose would be served by laying down any mathematical formula. The court went on to say: 'Suffice it to say that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate having regard to the total weight of the plant material … .'

[81] Clearly, the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of the tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. So, I do not think that it is correct to say that the case laid down the principle that at least 10% of the total weight must be taken as sample for the purpose of carrying out the tests. Indeed, I do not think that that case laid down any general principle. The decision was confined to the circumstances of the case and, as stressed by the court, what would be an adequate quantity would depend on the particular circumstances of each case. Even then, the question is: In the absence of a specific provision of the law, who is to determine what is the adequate quantity that should be taken as sample(s) for the purpose of carrying out the tests? The court or

the chemist? Who is the expert? Who carries out the test? The answer must be the chemist.

[82] With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v Lam Sam*. With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v Lam Sam* the 10% is nothing more that the practice among chemists.

[83] The only time the word 'ten per centum' appears in the Act is in s 37(j) reproduced above. That 10% mentioned in the Act refers to 'receptacles' when the drug is contained in a number of receptacles, not to the weight, not where, as in *Public Prosecutor v Lam Sam* and *Leong Boon Huat v Public Prosecutor* the drug was found in one package only.

[84] There appears to be a confusion as to the term 10%, ie 10% of what? This can be seen in *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 (CA). In that case dried plant material suspected was recovered from two packages. I shall allow the judgment of Shaik Daud JCA, delivering the judgment of the court do the rest of the talking (at p 668):

> He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s 2 of the Act. *Now under s 37 (j) of the Act, the chemist is required to take a minimum of 10% by virtue of s 37 (j) of the Act*. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 sample could well be much less than the 10% required to be taken. We hold that pursuant to s 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section. (Emphasis added.)

[85] With greatest respect, the sentence 'Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% by virtue of s 37(j) of the Act' is by itself ambiguous. 10% of what? If, as it appears to be, it is meant to be 10% of the total weight, clearly, that is not what s 37(j) says. Neither does the section say 10% of the weight in each receptacle. Again with respect, I am unable to find any provision in the Act that requires the actual weight of the samples taken must be given in evidence. All that the section says is that, if 'such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum *of such receptacles* …' (Emphasis added). The 10% refers to the number of receptacles, not the total net weight in all receptacles or in each receptacle. This had been made clear by the Federal Court since 1963 in *Au Ah Lin v Public Prosecutor*. It is unfortunate that neither *Au Ah Lin v Public Prosecutor* (FC), nor *Public Prosecutor v Lam Sam* (SC) was brought to the attention of the court. Even s 37(j) which was mentioned in the judgment was not reproduced for closer scrutiny.

[86] In the circumstances, with greatest respect, I am unable to follow *Leong Boon Huat v Public Prosecutor* and *Loo Kia Meng v Public Prosecutor.* Instead I prefer to follow *Au Ah Lin v Public Prosecutor* and *Public Prosecutor v Lam Sam*.

[87] In the instant appeal, the chemist in his evidence gave the net weight of the 'yellow granular and powdery substance' in each packet and the weight of monoacetylmorphines that he found in each packet, upon analysis. He took representative samples for the tests. He explained that by 'representative sample' he meant 'sample taken for analysis would represent the whole bulk of the substance from which the representative sample was taken for analysis. The margin of error has been accounted for in the final reporting of the quantity of monoacetylmorphines in the homogenised yellow substance.'

[88] The chemist was not cross examined at all either on the net weight of the 'yellow granular and powdery substance' in each packet or the total, the weight of monoacetylmorphines found in each packet or the total thereof or the weight of each sample taken or the total thereof.

[89] Based on the law as discussed earlier and the evidence of PW2, I am satisfied that the learned judge was perfectly correct in accepting his evidence.

[90] This ground too fails.

ALTERNATIVE SUBMISSION

[91] It was also argued, in the alternative, that the learned judge should have found that the prosecution had only proved custody and control against the appellants and therefore should have only called them to enter upon their defence for possession of the drug punishable under s 39A.

[92] With respect, I do not agree with the learned counsel's submission. This is because, as we have seen, the learned judge had made definite finding of possession by the appellants.

GROUND 23

[93] We shall now look at the appellants' defence. The learned judge has reproduced the evidence of the appellants and their witnesses at great length. I do not think that it is necessary to reproduce it. I shall, however, reproduce his discussion of their evidence and his findings.

> Di akhir kes pembelaan, setelah saya meneliti keterangan yang dikemukakan pada keseluruhannya, saya mendapati fakta yang tidak dipertikaikan ialah ketiga-tiga tertuduh berada dalam bilik tersebut pada 3 Februari 1999 jam lebih kurang 10.25 malam.
>
> Dalam pembelaannya OKT1 menjelaskan pada hari kejadian, setelah selesai menyimpan barang-barang restorannya di rumah tersebut, ia telah memasuki bilik tersebut pada jam lebih kurang 10.00 malam untuk menukar bajunya. OKT3 telah mengikutnya dari belakang dan dalam bilik tersebut telah menyerahkan kad jemputan itu. Seterusnya OKT2 pula memasuki bilik itu. Ia sedang berdiri bersama OKT3 apabila pihak polis menyerbu masuk bilik tersebut. Ia menafikan ia sedang duduk besila bersama dengan OKT3 dalam keadaan tidak berbaju berhadapan

barang-barang kes dan sedang mengendalikan dadah itu semasa pihak polis menyerbu masuk. A

OKT3 pula menyatakan ia pergi ke rumah tersebut dengan tujuan hendak menyerahkan kad jemputan itu kepada OKT1. Ia telah mengikuti OKT1 masuk ke bilik tersebut dan menyerahkan kad jemputan tersebut.

Semasa itu OKT2 pun masuk ke bilik tersebut. Ia mendesakkan ia sedang berdiri dengan OKT1 dalam bilik tersebut apabila pihak polis menyerbu masuk. Ia juga menafikan ia sedang duduk bersila bersama OKT1 dalam keadaan tidak berbaju berhadapan barang-barang kes dan sedang mengendalikan dadah itu semasa pihak polis menyerbu masuk. OKT3 pula mengakui OKT2 ada jenguk dari pintu bilik tersebut apabila mereka mendengar bunyi bising di luar bilik tersebut dan mendengar seorang berteriak 'Polis'. B C

Dalam pembelaannya OKT2 pula menyatakan ia masuk ke bilik tersebut untuk meminta wang dari OKT1 untuk membeli makanan. Pada masa itu OKT1 dan OKT3 sedang berdiri dan bercakap sesuatu. Setelah ia mendengar bunyi bising di luar bilik tersebut dan perkataan 'polis' ia telah menjenguk dari pintu bilik tersebut dan pada masa yang sama pihak polis telah menyerbu masuk bilik tersebut. OKT2 menafikan ia tutup pintu itu sebaik sahaja ia melihat anggota polis dan menahan pintu dari di buka apabila SP4 hendak memasuki bilik tersebut tetapi mengakui SP4 ada menendang pintu bilik tersebut. D

Saya mendapati pembelaan ketiga-tiga tertuduh berbentuk satu penafian sahaja. Di akhir kes pembelaan saya mendapati pihak pembelaan tidak membawa atau menimbulkan apa-apa keraguan terhadap kes pendakwaan. Pihak pembelaan mencadangkan rumah tersebut merupakan rumah orang bujang dan ramai orang mempunyai akses ke rumah tersebut. Pihak pembelaan juga mencadangkan mana-mana orang boleh menggunakan bilik tersebut. Di samping itu ketiga-tiga tertuduh menyatakan penghuni rumah itu adalah Naga, Suresh dan Balan. E

Seterusnya ketiga-tiga tertuduh termasuk SD4 telah menyatakan semasa mereka ditahan di ruang tamu rumah tersebut bersama beberapa lelaki India yang lain itu, pihak polis telah menjumpai satu beg 'pouch' yang mengandungi peket-peket plastik berisi bahan kuning dan satu peket plastik lutsinar dibaluti kertas yang mengandungi bahan yang sama di atas sofa dan di atas atau berhampiran sebuah set televisyen di ruang tamu itu. Semasa SP4 diperiksa balas di peringkat kes pendakwaan, peguam OKT1 ada mencadangkan kepadanya bahawa ia menjumpai satu beg 'pouch' di atas sofa dalam ruang tamu itu dan SP4 telah tidak bersetuju dengan cadangan itu. SP4 juga tidak bersetuju dengan cadangan peguam bahawa ia ada menjumpai dadah di ruang tamu rumah tersebut seperti dicadangkan. Walau apapun, SP4 tidak pernah disoal di peringkat kes pendakwaan tentang peket plastik lutsinar yang berisi dengan bahan kuning yang dibaluti dengan kertas yang dikatakan berada di atas set televisyen atau berhampiran dengan set televisyen itu yang terletak di ruang tamu rumah tersebut. Setelah saya meneliti keterangan SP4 dan bandingkannya dengan keterangan tertuduh-tertuduh dan juga SD4, saya berpendapat beg 'pouch' dan peket plastik berisi dadah yang dibaluti dengan kertas itu tidak wujud. Pada keseluruhannya penjelasan tertuduh-tertuduh tidak menimbulkan dalam minda saya keraguan yang munasabah terhadap salahnya tertuduh masing-masing. F G H

Kesimpulannya saya mendapat kes pembelaan tidak membawa atau menimbulkan apa-apa keraguan terhadap kes pendakwaan. Saya juga mendapati pihak pembelaan gagal mematahkan anggapan statutori bahawa tertuduh-tertuduh mengedar dadah itu. Saya berpuashati melampaui keraguan munasabah bahawa tertuduh- I

A tertuduh bersama-saraa telah melakukan kesalahan pengedaran dadah itu. Penjelasan yang diberi oleh tertuduh-tertuduh tidak menimbulkan apa-apa keraguan. Apa yang jelas ialah keterangan dengan jelas menunjukkan tertuduh-tertuduh telah bersama-sama melakukan perbuatan jenayah itu, iaitu, mengedar dadah berbahayaitu bagi mencapai niat bersama mereka semuanya dan oleh itu adalah bertanggungan atas perbuatan itu. Oleh itu saya telah memutuskan tertuduh-tertuduh bersalah
B dan mensabitkan mereka atas kesalahan mengedar dadah berbahaya itu dibawah seksyen 39B(1)(a) Akta itu. Seperti diperuntukkan oleh seksyen 39B(2) Akta itu, saya telah menjatuhkan hukuman mati terhadap tertuduh-tertuduh.

[94] Learned counsel for the first and second appellants argued that the defence was reasonable or probable to rebut the presumption (da). He reiterated
C that the first accused brought his things to be kept in the house. Naga, Suresh and Balan were among the 10 people arrested. The second and third appellants assisted to unload the lorry. The lorry driver (DW4) was also arrested. Suresh, Naga and Balan were occupiers of the house. All those were not challenged, he submitted. Learned counsel referred to *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 (S.C), in particular the passage:

D Held allowing appeal: (1) Even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution's case.

[95] First, from the notes of evidence, I note that the learned deputy public
E prosecutor had cross-examined the appellants and their witnesses at great length. Questions were put on all material aspects of the appellants' evidence, including that the story about the alleged transfer of the first appellant's goods to the house was a mere fabrication. That Naga, Suresh and Balan and DW4 (the lorry driver) were among the people arrested, is not in dispute. As to who are the 'penghuni tetap', on the facts as to how and where the
F drug was found in relation to the appellants, it is not material. The point is, the learned judge had considered their evidence with great care and at great length and made his findings (of facts) that he did.

[96] It is also not correct to say that the learned judge failed to apply his mind to the principle stated in *Mohamad Radhi*'s case reproduced above.
G The part of his judgment that we have reproduced shows that he did so in coming the findings that he did.

[97] In conclusion, I find that the learned judge had not misdirected himself on the law. He had considered the evidence both for the prosecution and for the defence very carefully, gave his reasons why he accepted or did not
H accept certain evidence and correctly came to the conclusions that he did. He had the advantage of seeing and hearing the witnesses. I see no reason why I should interfere with his findings of facts or his final decision.

[98] I would dismiss the appeal and confirm the convictions and sentence.

I **Abdul Aziz Mohamad JCA** (dissenting judgment):

[99] The charge against the three appellants was one of trafficking in the dangerous drug monoacetylmorphines, but it was not trafficking as statutorily

defined, such as manufacturing, that the prosecution sought to establish. The offence that the prosecution sought to establish was trafficking by presumption from the fact of possession of more than 15g of the drug. What the prosecution had, and sought, to prove was possession. Possession being a legal concept and something that is dependent for its existence on a set of facts, to prove possession the prosecution sought to prove a set of facts. The facts adduced by the prosecution to establish possession have been set out in outline by my learned brother Dato' Abdul Hamid. As far as the first and third appellants were concerned, the basic and major component of those facts was the fact that when the police officers burst into the room they were found seated cross-legged (bersila) and shirtless on the floor with the drugs and the other things before them and with the first appellant doing something which I shall relate at the proper juncture. On that set of facts, the learned trial judge found that they were in possession of the drug. As for the second appellant, who was found standing near or behind the door after, so it was said, unsuccessfully attempting to bar the entry of the police officers by pushing against the door, the trial judge found, on the basis of s 34 of the Penal Code, by reason of common intention, that he was also in possession of the drug. That was the picture that the prosecution basically depended upon for proof of possession against the three appellants.

[100] Each of the three appellants gave evidence in their defence which was supported by the evidence of the other appellants. The evidence of one appellant substantially fitted with and complemented that of the others. The trial judge did not point to any discrepancies in their evidence. Besides their denial of involvement with or knowledge of the drug, and to support the denial, the picture in relation to the question of possession that the evidence of the three appellants presented was that the second appellant did not push against the door and that when the police officers burst into the room the first and third appellants were standing talking together in their shirts while the first appellant was reading an invitation card that the third appellant had handed to the first appellant for the wedding of the third appellant's elder brother. I may mention that it was a fact established by the evidence of the elder brother, Jesudass, the fifth defence witness, that he was wedded on 6 February 1999, three days after the arrest of the three appellants, and that invitation cards had been printed for the occasion. Apart from that picture as to their respective dispositions when the police officers entered the room which for convenience only I shall refer to as 'the combing room' merely because according to the appellants it was a room where the frequenters of the house were free to go in and out to comb their hair and do other things — the appellants also alleged that the drug was not all found in the combing room, that in the sitting room where ten male Indians had been sitting and watching television there were found a black pouch-bag and a paper package containing drugs, and that in the combing room the appellants had been beaten and kicked by the police officers or one of them. But if the trial judge had found that it was probable that the second appellant had not attempted to prevent the entry of the police officers into the combing room and that when they entered the room the first and third appellants were disposed as they said they were, then the factual basis on which the prosecution sought to establish

possession against the first and third appellants and, by the operation of s34 of the Penal Code, against the second appellant, would have been thrown into reasonable doubt and the appellants would have been entitled to an acquittal.

[101] As with every situation in which a man is found or finds himself, according to the appellants there were events that led to and culminated in what they claimed to be their innocent presence in the combing room when the police entered it. My learned brother has set out that part of the trial judge's grounds in which he discusses the evidence of the three appellants, but the evidence discussed there does not go to the beginning. As my learned brother said, elsewhere and earlier the trial judge has narrated the evidence of the appellants and their witnesses at great length. It is a good account that the judge has set out there although one or two details may have been omitted or overlooked. I need not, for the purpose of dealing with the question that is going to form the crux of my judgment, set out the evidence in detail and at great length. I need only to set out in broad outline the totality or combined effect of the evidence, mentioning certain details that the trial judge did not mention and that could lend a touch of realism to the appellants' story.

[102] It all started with the first appellant facing the need to find an alternative place to store the furniture and other things of his family restaurant in Klang which had closed down. The furniture and things had been kept at a place in Kampung Pandan. An alternative place was needed because the rental for the store in Kampung Pandan was rather high. The first appellant had obtained the consent of Balan and Suresh, two of the permanent occupants of the house where the appellants were arrested, which was a squatter-house frequented by Indian bachelors to loaf away their time, to keep the things there. On the day in question, the first appellant had engaged the services of a man who had a small one-ton lorry to transport the things from Kampung Pandan to the squatter-house, which was in Sungai Besi. Two trips were needed, the charge for one trip being RM60. The man was Ganesan a/l Suppaiyah, the fourth defence witness. To avoid confusion, as he bore the same name as the second appellant, I shall refer to him as 'the lorryman'. The second appellant had been contacted by the first appellant and asked to come to the house to help with the things when they arrived from Kampung Pandan. The third appellant, who did not know exactly where the first appellant lived, and who had wanted to give him the wedding invitation, had gone to the squatter-house after telephoning the first appellant's house and being informed by his mother that the first appellant was going to the squatter-house to send the restaurant things.

[103] That was how the three appellants, according to them, came to be at the house that evening. The lorry made two trips, the first appellant going with the lorryman each trip. At the end of each trip, the things were unloaded with the participation of the three appellants and certain others who were at the house. After all the things had been brought over, everyone took part in arranging them in the kitchen of the house. When the work had been done, the first appellant had gone into the combing room to change his shirt. The

third appellant, seeing the first appellant enter the combing room, also went in to give to him the wedding invitation, which he had been unable to do earlier because they had been busy with the restaurant things. The second appellant, who had been asked by the first appellant, when they were arranging the things in the kitchen, to buy food for everyone who had been working, and who had been looking for the first appellant to ask him for the money for the food, had entered the combing room after inquiring of the people who were in the sitting room and being told that the first appellant had gone into the combing room. When he entered the combing room he saw the first and third appellants standing and talking while the first appellant was looking at the wedding invitation. After several seconds the police arrived in the room.

[104] The story about the transportation of the restaurant things was corroborated by the lorryman. According to this witness, after the final unloading of the restaurant things he had washed the lorry, which had stopped in front of the door of the house, and he was waiting outside the house for his payment when the police arrived and herded him and others into the house. This witness claimed that he was also punched and kicked by the police so that his mouth became blue-black and a front tooth of his broke and had to be pulled out subsequently. From the questions asked of this witness in cross-examination by the DPP, it does not appear to me that there was any attempt, or any serious attempt, to question the truthfulness of his evidence about the transportation of the restaurant things. The second appellant had in fact stated that the things that could be seen in photograph P14C were things that had been brought down from the lorry.

[105] Now I come to the crux of my judgment. As will be seen from a careful reading of the passage reproduced by my learned brother in which the trial judge discusses the evidence of the defence, the trial judge found that it failed to raise a reasonable doubt on the case for the prosecution and the reason for his so finding was that the defence was a mere denial (satu penafian sahaja). If what he meant by mere denial was that the defence was not supported by some independent or concrete evidence, in my opinion he was wrong to dismiss the defence for that reason because if events had truly occurred as claimed by the three appellants they were of such a nature that no independent or concrete supporting evidence would have been available to the appellants. It would be a case of one man's word, the police officers', against another's, the appellants' and the lorryman's. If what the judge meant was that after considering the evidence for the prosecution and the defence he found that the story of the defence was improbable, he has not given his reasons for so finding. Did he or did he not find the story about the transportation and arranging of the restaurant things true or probable? If he did, what ware his reasons for finding that the story as to the ensuing events was not true or probable? He has not given his reasons, except in respect of one matter that I shall deal with presently.

[106] The duty to give reasons for finding that the defence has failed to cast a reasonable doubt on the prosecution case, in other words that it is not probable though relevant, is set out by the Supreme Court in *Mohamad Radhi*

bin Yaakub v Public Prosecutor [1991] 3 MLJ 169 in the following words of Mohamed Azmi SCJ at p 171E–H:

> In this connection, counsel for the appellant had referred to us the case of *PP v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[107] It is said there that 'the accused must not be convicted until the court is satisfied for sufficient reason that [his] explanation does not cast a reasonable doubt in the prosecution case'.

[108] In the last but one paragraph of the passage reproduced by my learned brother, the judge states his finding that the black pouch-bag and the paper package containing drugs that the appellants claimed were found by the police in the sitting room did not exist. The judge, however, does not say whether he found the appellants' claim was not only not true but was also not probable. Assuming that he found that it was not even probable, he says that that was after scrutinizing the evidence of Chief Inspector Rajendran (the fourth prosecution witness), who led the police party, and comparing it with the evidence of the appellants and the lorryman. It is not clear from that paragraph what it was that he found from the scrutiny and comparison that gave him reason for finding, if he did so find, that the story of the appellants was not even probable. A reason there seems to be, although he has not expressly said so, but before I state it, let me set out, as far only as is necessary for the point in hand, the evidence of the three appellants as regards the black pouch-bag and the paper package.

[109] Accocding to the first appellant, the pouch-bag was found 'di sofa' or at the sofa and the paper package was found near the TV. According to the second appellant, the pouch-bag was found 'di sebelah kusyen (cushion) panjang' or beside or at or by the side of the sofa. Although the second appellant did mention the finding of the paper package, he did not say where it was found. According to the third appellant, the pouch-bag was found near the sofa and the paper package was found near the TV. The lorryman mentioned only the finding of the pouch-bag but his evidence would seem to be that he did not see where it was found and that he knew about it only after it was found, when the police came round asking everyone in the sitting room whose bag it was.

[110] Now earlier, when Chief Inspector Rajendran was cross-examined by the first appellant's counsel, it had been put to him that a black pouch-bag was found on the sofa, which he denied, and he was not asked about the paper package. It would appear from the paragraph in question that the judge might have found the appellants' claim about the black pouch-bag and the paper package as not even probable because the first appellant's counsel did not also cross-examine the Chief Inspector about the paper package and because in cross-examining him about the pouch-bag it was suggested that it was found on the sofa whereas the appellants in their evidence subsequently claimed that it was found at or near the sofa. To my mind, those would have been very slender reasons for finding that the claim as to the finding of the pouch-bag and paper package was not even probable.

[111] Reading the passage cited by my learned brother, the judge's rejection of the appellants' claim concerning the pouch-bag and the paper package might be seen as the only reason that he had to offer for finding that the defence, which ultimately centred on denying the circumstances concerning the appellants relied on by the prosecution as constituting or proving possession, was not probable. No reasons are given that are directed to the circumstances themselves, that is to say, the circumstances when the police came to and entered the combing room. The essential defence of the appellants related to those circumstances and the events leading to them. The only reason given for finding those circumstances not probable was the finding of improbability for slender reasons of a secondary claim by the appellants as to the finding of other drugs in the sitting room. In my opinion, the trial judge has failed to give sufficient reasons for finding that the defence story failed to cast a reasonable doubt on the prosecution case.

[112] The need to give such reasons becomes of particular and practical importance in this case in view of two remarkable circumstances in the evidence for the prosecution that were fit to be considered in determining whether the defence story was probable. I proceed to state those circumstances.

[113] To begin with, there certainly would have been a lot of noise before the police officers entered the combing room. The police team consisted of nine officers. One of them was bitten by a dog outside the house. This was confirmed by the Chief Inspector in his re-examination. Then, when they entered the sitting room, the prosecution evidence was that there were ten male Indians in the room and the Chief Inspector declared 'police' in a loud and firm voice that would have been heard by all of them. In re-examination, the Chief Inspector said that from the time he entered the sitting room until he entered the combing room four or five seconds had elapsed. It was submitted by counsel for the first appellant after the close of the prosecution case, whose submission was adopted by counsel for the other appellants, that in those circumstances the first and third appellants would have been aware of the presence of the police and it was incredible that if they had been sitting cross-legged facing the drugs before the police arrived they would have continued to remain in that position when the police burst into the combing room. It was a point that merited serious consideration because

even though the first and third appellants would have had only four or five seconds within which to react to the knowledge of the presence of the police, the normal reaction one would expect of a person in that situation would be instinctively instantaneous. He would instantly at least jump up and get away from the incriminating drugs. Yet the judge disposed of the point on the basis that the Chief Inspector and the other witness, the sixth prosecution witness, Detective Lance Corporal Duraiyappa, appeared to be truthful witnesses and what they said they saw must have been so. If a fact is in itself incredible it does not become any the less incredible simply because the person who relates it appears to be truthful. To accept it as true beyond reasonable doubt, to be able to entertain no doubt as to its truth, one has to have a reason for accepting it as credible in the circumstances. The judge does not say that in his judgment it was not incredible in the circumstances and give his reasons for saying so. He merely relied on the apparent truthfulness of the witnesses.

[114] Then there was the conflicting evidence as to what the first appellant was actually doing when the police officers entered the room. The evidence was that the Chief Inspector was the first to enter, followed by Duraiyappa, at his heels as it were. The Chief Inspector said that the first appellant dropped a heat-sealer on to the floor. Duraiyappa, in examination-in-chief, said that he saw the first appellant putting powder in a small plastic packet. When cross-examined by counsel for the first appellant he said that the first appellant was in the act of putting powder into a small plastic packet but had not yet managed to do so when the police entered the room. He said that he was sure he saw it. When counsel for the third appellant put to him that the first appellant was not holding a small plastic packet, Duraiyappa said that what was put to him was not true, thus insisting that the first appellant was holding a small plastic packet. There was, I should mention, no evidence of the finding of a small unfilled plastic packet by itself.

[115] It is necessary that I set out fully the manner in which the trial judge dealt with this conflict of evidence. This is what he says:

> Mengenai pertikaian pihak pembelaan bahawa wujudnya percanggahan dalam keterangan SP4 dan SP6, saya telah meneliti apa yang ditimbulkan oleh peguam dan berpendapat percanggahan itu tidak menjejaskan kes pendakwaan. SP4 menyatakan sebaik sahaja ia memasuki bilik tersebut ia melihat OKT1 melepaskan alat 'heat-sealer' itu. SP6 pula, yang mengikuti SP4 dari belakang, menyatakan ia melihat OKT1 sedang mengisikan dadah dalam satu peket plastik kecil dan kemudiannya menjelaskan OKT1 tidak sempat berbuat demikian. Kedua-dua saksi ini telah menceritakan apa yang mereka masing-masing buat. Isu yang penting dalam kes ini adalah sama ada barangan yang mengandungi dadah itu berada dalam milikan OKT1 antara lain, semasa ia ditangkap. SP4 dan SP6 memberi keterangan tentang apa yang mereka masing-masing ternampak semasa mereka memasuki bilik tersebut. Pada saya, perbezaan tentang apa mereka masing-masing lihat menggambarkan mereka tidak mereka-reka cerita untuk menguatkan kes pendakwaan seperti dicadangkan oleh pihak pembelaan. SP4 telah memasuki bilik tersebut dahulu daripada SP6 dan ia melihat OKT1 melepaskan alat 'heat-sealer' itu. SP6 pula melihat OKT1 sedang mengendalikan sebuah peket plastik. Soalan yang penting ialah sama ada barangan yang mengandungi dadah itu

berada di hadapan OKT1 antara lain, dan sama ada ia boleh melihat dadah itu dengan jelas. Keterangan SP4 mengenai 'heat-sealer' itu, jika diterima, akan menyokong pendirian pihak pendakwaan bahawa OKT1 sedang atau ada mengendalikan barang-barang kes termasuk dadah itu. Saya lebih cenderung kepada keterangan SP4 memandangkan ia adalah anggota polis pertama yang memasuki bilik tersebut.

[116] It is firstly to be observed that the judge seems not to have placed importance on the conflict because he says that what was important was whether the 'barangan' containing the drugs was present in front of the first appellant. As to the conflict, he says that the Chief Inspector and Duraiyappa were relating what they respectively saw. But obviously the first appellant could not have been doing at that same instant both what the Chief Inspector and Duraiyappa respectively said that he was doing. Then the judge says that the fact that there was a difference in what the two witnesses said they saw the first appellant do showed that their evidence was not a fabrication. It is true that minor discrepancies are to be expected in the evidence of different witnesses about the same thing and that when evidence is fabricated the witnesses are likely to give evidence that is identical to the last detail. But the conflict of evidence in this case was not over a trivial or insignificant matter. It was about an activity that the prosecution relied on, besides other factors, to prove knowledge in order to establish possession of the drug. Finally, the judge says that he preferred the evidence of the Chief Inspector because he was the first to enter the combing room. That means that the judge accepted that what the first appellant did was to drop the heat-sealer, as claimed by the Chief Inspector, and not to attempt to fill a plastic packet, as claimed by Duraiyappa. But the reason for accepting what the Chief Inspector said he saw as what actually happened surely cannot be sound. Although the Chief Inspector entered the room first, it was only in the sense that he was in front of Duraiyappa, but they entered at the same instant and it was in that instant that they saw what was going on. When two persons who say they directed their attention to the same spot at the same instant give entirely different accounts of what they saw, there is no reason in logic or nature to credit the one who was in front of the other with the correct vision. And in such a situation the question that would arise would be not only one of choice between the two accounts but also one of deciding whether either of those persons actually saw what he claims to have seen. In this case the question that would arise from the conflict, coupled with the first circumstance, is whether the first and third appellants were actually found sitting on the floor with the drugs and other things in front of them.

[117] Although at the close of the case for the prosecution the judge had found, for the reasons that I have set out, that those two circumstances did not impair the case for the prosecution, after hearing the evidence for the defence, he should have tested it against the prosecution evidence in order to determine whether the defence story was probable, and in doing so he should have recalled those two circumstances that had emerged even in the evidence of the prosecution and taken them into consideration. But as I read his grounds of judgment and as I have attempted to show, he has

offered no reason or no sufficient reason, and therefore may have had no reason or sufficient reason, for finding that the defence was not probable and therefore failed to cast a reasonable doubt on the case for the prosecution. Therefore, according to *Mohamed Radhi bin Yaakub,* the three appellants should not have been convicted. For that reason, I would allow their appeal.

[118] I wish to lend support to the stand of my learned brother on the opinion of this court in *Loo Kia Meng v Public Prosecutor* and on the decision of the Supreme Court in *Leong Bon Huat v Public Prosecutor*. My learned brother's stand is in response to the submission on behalf of the appellants that there was no evidence as to how many random samples of the substance the chemist took for analysis and as to the weight of the samples taken for analysis. The submission was made in reliance on *Loo Kia Meng*, which turned to *Leong Bon Huat* for support. The essential passages in the judgments in those two cases have been set out by my learned brother.

[119] In prosecutions for offences involving the possession of a dangerous drug, it is important for the prosecution to prove that the substance is a particular dangerous drug and the weight of it, because the penalty for the offence depends on the weight of the particular dangerous drug. The proof is furnished by the evidence of a chemist, an expert who examined and analysed the substance. Cross-examination of the chemist will seek to find fault with the manner in which the chemist arrived at his conclusion in order to create a doubt in the mind of the court as to the nature of the substance or, which I perceive is more often the case, as to the weight of the particular dangerous drug, because the severity of the penalty depends upon the weight. The approach that the court should take towards the evidence of the chemist as an expert has been stated by the Supreme Court in *Public Prosecutor v Lam San*, which refers back to another Supreme Court decision, that in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. My learned brother has set out the essential passage from Lam San, which includes the essential passage from *Munusamy.* Essentialy the approach should be to accept the evidence of the chemist as true even though the chemist has not shown in detail what he did in the laboratory, unless the evidence is so inherently incredible that no reasonable person can believe it to be true or there is evidence that contradicts from another expert.

[120] No law or statute has laid down the process which a chemist is bound to use in order to prove the nature of a substance as being or as containing a particular dangerous drug or the weight of the dangerous drug in a bulk of the substance. The process belongs to the realm of science and is devised according to the discipline and principles of science. Section 37(j) of the Dangerous Drugs Act 1952, which my learned brother has set out, is so worded that it is not intended to be a mandatory method of analysing a substance to establish that it contains a particular dangerous drug or to establish the amount of it. It is intended to provide a facility that may be used. It is intended to facilitate, not to shackle. Leaving aside for the moment the exact circumstances in which the section is intended to apply, the basic idea is that, of the whole you need to analyse only so much, and if you do

that it shall be presumed, until the contrary is proved, that the result is good for the whole. The presumption is mandatory, if you analyse just that much, and there lies the facility, but the section does not make it mandatory that proof as to the whole be established by resort to the mandatory presumption. Science may find other ways of proof in respect of the whole that are more thorough and conclusive.

[121] Coming now to specifics, two things need to be said about the section. First, even if the facility of the presumption is to be resorted to, it is not in every case that it may be resorted to. It may be resorted to only where the substance 'is contained in a number of receptacles'. It is a facility only for such a situation. Second, if the section is to be resorted to in such a situation so as to have the benefit of the presumption, you have to analyse 'samples of the contents of a number not less than ten per centum of such receptacles'. The samples to be analysed are samples of the contents of a number of the receptacles. The number, that is the number of receptacles, must be not less than ten per centum of the receptacles. The ten per centum therefore refers to the number of receptacles. You have to take samples from that number of receptacles. As to how much of sample is to be taken from each receptacle and analysed, the section does not specify. The ten per centum does not quantify the sample.

[122] For what I am going to say about *Loo Kia Meng*, I need to set out the whole of the relevant paragraph, of which what my learned brother has set out forms only a part:

> The second issue was on the improper method of analysis adopted by the chemist. The chemist in his evidence testified that his analysis on the dried plant material consisted of four tests, ie physical examination, microscopic examination, deguinos levine test and the thin layer chromatography test. For the physical and microscopic examinations he examined all the dried plant material. For the other two analysis he had to prepare chemical tests which necessitate taking representative samples. He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s 2 of the Act. Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random sample [sic] but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less that 10%, It is encumbent [sic] upon the chemist to take a minimum of 10% by virtue of s 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 sample [sic] could well be much less than the 10% required to be taken. We hold that pursuant to s.37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

[123] It is obvious to me from the first part of the paragraph that the chemist, in arriving at his findings about the plant material in that case,

followed, as in the present case, a process that did not have to rely on the facility of s 37(j). Yet the paragraph suggests that s 37(j) has to be complied with as if, contrary to the opinion that I have expressed, the section precluded the adoption of some other process. Further, contrary to the clear wording of the section, the passage proceeds on the understanding that the 10% mentioned in the section refers to the samples taken for analysis. For those reasons, I share my learned brother's inability to follow *Loo Kia Meng*.

[124] *Leong Bon Huat*, from which *Loo Kia Meng* sought to derive support, was also a case where the chemist followed a process that did not have to rely on the facility of s 37(j). In any case the section could not apply in that case because the substance was not 'contained in a number of receptacles'. The substance was a bulk of dried leaves, suspected to be cannabis, in a bag, weighing 793.85g. And in speaking of samples, there was nothing to indicate that the Supreme Court were thinking of the position under the section.

[125] The chemist found that the whole bulk was 793.85g of cannabis. As to how he arrived at that conclusion, he said:

> I conducted a visual examination of the contents of 'E1' and then I took samples of the content of dried plant material. I examined the samples using chemical methods and also conducted microscopic examination. I took samples from various positions of each layer of the dried plant matter and I examined and analysed such samples individually.

[126] The Supreme Court, I believe in relation to the 'visual examination', said that 'the chemist did say that he had conducted a physical examination of the whole plant material', that is, 'examination by a microscope'. The Supreme Court further said that 'such an examination might well establish, on the balance of probabilities, that the plant material was cannabis'.

[127] From what the chemist and the Supreme Court said, it is obvious to me that what the chemist did was first to conduct a visual or physical examination of the whole bulk, which would have shown to him that it was cannabis. But to be doubly sure, to make it sure beyond any doubt, he next conducted a chemical examination, of samples from the bulk. These samples, it is important to note, were not taken from one corner or portion in the bulk. They were taken 'from various positions of each layer of the dried plant material', that is to say, from all over the bulk. The analysis of each sample would have proved that it was cannabis. Since the samples came from various positions throughout the bulk, and since they were proved conclusively by analysis to be cannabis, by logic of the order of nature the entire bulk, which on physical examination had already indicated that it was cannabis, must conclusively be cannabis.

[128] For such a method of determination, it would not have been necessary for the amount or weight of each sample that was chemically analysed, or the total amount or weight of the samples, to be determined, because the method did not depend upon a particular or precise amount or weight of each sample analysed. The soundness of the method for determining the nature of the bulk depended on the fact that the samples were taken

from all over the bulk. If at all the soundness of the method, or rather the soundness of the result obtained from such a method, is to be doubted in a particular case, it will have to be on the basis that the number of samples taken — which was twenty in *Loo Kia Meng* — was not sufficient or that the places in the bulk from which the samples were taken were not sufficiently evenly spread, but not on the basis that the amount of each sample, or the total amount of the samples, was not sufficient. For that reason, as I believe, the chemist in *Leong Bon Huat* did not, in examination-in-chief, state the weight of each sample or the total weight of the samples. I believe that it was only in cross-examination that the question of weight of samples arose, and that that resulted in the chemist saying in re-examination that he did not obtain the weight of each sample but that the total weight of the samples was more than 10% of the net weight of the bulk, which was 793.85g.

[129] The Supreme Court, however, focused their attention on the question of weight of the samples as if the method adopted by the chemist was one in which the weight of the samples chemically analysed was important. But even so the Supreme Court did not lay down any particular amount as a sufficient amount. The Supreme Court said that what amount would be sufficient would depend on the particular circumstances of each case. But the Supreme Court found that for the particular case before them it was not sufficient, the sole reason being, 'having regard to the total weight of the plant material', which was 793.85g. As my learned brother has observed, the case did not lay down any particular principle. It was a decision for that case only. The Supreme Court took it upon themselves to hold that the amount of the samples was not sufficient. In that respect the decision of the Supreme Court was out of line with the proper approach set out by the Supreme Court in *Lam San*.

[130] But what strikes me more forcefully about the finding that the amount of the samples was inadequate is that there is a strong indication in the judgment that the Supreme Court may have overlooked the significance of the method adopted by the chemist. This indication I find from the statement that it was obvious from the extract from the testimony of the chemist set out in the judgment that 'the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis' and the statement that since the more than 10% that the chemist said he took for analysis could mean just a little more than 10%, 'the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79,30g of cannabis', which would be below the statutory minimum required for the statutory presumption of trafficking to arise. Those statements strike me as an indication that the Supreme Court understood that the samples that the chemist took were taken from just one part of the entire bulk, overlooking the chemist's evidence that he 'took samples from various positions of each layer of the dried plant material' and the significance of that for the conclusive determination of the nature of the entire bulk.

[131] The only principle that one might be tempted to derive from *Leong Bon Huat* is that in the case of a method of determination such as that adopted by the chemist, it is entirely up to the court to decide, even in the absence of expert evidence to that effect, that the amount taken for analysis is insufficient having regard to the total amount of the bulk. For the reasons that I have stated, I share my learned brother's inability to follow *Leong Bon Huat*.

Appeal dismissed.

Reported by Lim Lee Na